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The Congruent Constitution (Part Two): Reverse Incorporation

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The Congruent Constitution (Part Two):

Reverse Incorporation

Jay S. Bybee[*]

In Bolling v. Sharpe *(1954), a companion case to* Brown v. Board of Education*, the Supreme Court thought it "unthinkable" that the Equal Protection Clause would not apply to the federal government as well as the states and declared it "reverse incorporated" through the Due Process Clause of the Fifth Amendment. The Equal Protection Clause is the most familiar example of reverse incorporation, but it is neither the first nor the only provision of the Constitution that, by its terms, applies to the states alone, but which the Supreme Court has made applicable to the federal government through the Due Process Clause. The Court has, from an early period and throughout its history, systematically ignored the Constitution's signals dictating to which level of government a provision applies. Aside from the Equal Protection Clause, the most important of these reverse incorporated provisions is the Contracts Clause—which was among the most litigated clauses of the nineteenth century—but there are other clauses that have been effectively reverse incorporated against the federal government as well. What has resulted is a congruent Constitution, a series of good government provisions that the Court has treated as universals rather than*

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binding only the government identified in the Constitution. The Court has made little effort to justify its reverse incorporation decisions through anything more than the amorphous principle of "due process." One consequence is that reverse incorporated provisions are substantively congruent, but textually discordant.

This Article reviews the history of reverse incorporation, most of which has not been told before. The Article argues that there is nothing "unthinkable" about the Constitution requiring different things of the states and the federal government, and that in the process of creating a congruent Constitution the Court has overenforced some provisions against the federal government and underenforced others against the states. Indeed, the Court's congruence principle skews the choice of the substantive rule because it forces the Court to find a single rule applicable to both levels of government. The choice of a unitary rule may affect matters as diverse as mortgage relief in times of emergency and reparations for slavery. In the end, congruence is convenient for the Court, but it has blurred our federalism and altered our separation of powers. The latter point is critical: Through reverse incorporation, the Court has vastly expanded its own authority over Congress and the Executive, without the sanction of legislation or constitutional amendment under Article V.

This is the second part of a two-part study of the Court's congruence principle. The first part appeared in the prior issue of the Brigham Young University Law Review. See Jay S. Bybee, The Congruent Constitution (Part One): Incorporation, 48 BYU L. REV. 1 (2022).

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I. INTRODUCTION

Brown v. Board of Education[1] is the most consequential decision of the twentieth century. A consolidated appeal from school districts in Delaware, Kansas, South Carolina, and Virginia, *Brown* formally overruled the Court's gross misstep in *Plessy v. Ferguson*,[2] established the principle that separate schools for white and black students were not equal schools, and held that forced segregation violated the Equal Protection Clause of the Fourteenth Amendment.[3] The decision was controversial, but among devoted Court watchers, not unexpected. The Court's equal protection decisions had evolved, and the Clause was rapidly gaining new stature.

1. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

2. Plessy v. Ferguson, 163 U.S. 537 (1896).

3. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

Brown was not the only consequential decision issued that day. Following *Brown* in the *United States Reports* was *Bolling v. Sharpe*.[4] Where *Brown* had concerned segregated schools in the states, *Bolling* was a challenge to segregated schools in a federal enclave, the District of Columbia. Although the Court had recently held that the District of Columbia could be treated as a state for purposes of diversity jurisdiction,[5] the Court had repeatedly held that the Equal Protection Clause, by its own terms, did not apply to the federal government.[6] As the Court admitted, "[t]he Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment[.]"[7] Nevertheless, in an opinion of just six paragraphs, spanning about two pages, the Court announced that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government[,]" and held that "racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment[.]"[8] Over time the Court began referring to the *Bolling* principle as "the equal protection component of the Due Process Clause[,]"[9] and ultimately announced that the equal protection principle applied to the federal government "precisely" as it bound the states.[10] Without consideration of text, history, or precedent, the Court declared the Equal Protection Clause applicable to federal legislative and executive action.

The rule of *Brown* and *Bolling* was certainly politically palatable: segregation in schools on the basis of race is forbidden by the Constitution, whether the schools are located in the states or in the District of Columbia. Moreover, the rule is substantively congruent, because the same rule applies to the states and the federal government. But the rationales for the rule are textually discordant: the rule in *Brown* applies to the states because of the Equal

4. Bolling v. Sharpe, 347 U.S. 497 (1954).

5. Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 600 (1949).

6. *See infra* Section II.B.3.

7. *Bolling*, 347 U.S. at 499.

8. *Id.* at 500 (footnote omitted).

9. *E.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973); *see also* Ziglar v. Abassi, 137 S. Ct. 1843, 1853 (2017).

10. Weinberger v. Weisenfeld, 420 U.S. 636, 638 n.2 (1975); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 215 (1995).

Protection Clause of the Fourteenth Amendment, and the rule in *Bolling* applies to the federal government because of the Due Process Clause of the Fifth Amendment. The Court in *Bolling* had explained that although "the concepts of [E]qual [P]rotection and [D]ue [P]rocess, both stemming from our American ideal of fairness, are not mutually exclusive[,]" it did not mean to "imply that the two are always interchangeable phrases."[11] If the Due Process Clause of the Fifth Amendment was sufficient to end segregation in the District of Columbia, why wasn't the Due Process Clause of the Fourteenth Amendment—which is identical—sufficient to hold segregated schools unconstitutional in the states? Had the Court so held in *Brown*, *Bolling* would have given us a rule that was textually and substantively congruent. Indeed, had the Court decided *Bolling* before *Brown*, it could have decided both cases on the basis of the Due Process Clauses of the Fifth and Fourteenth Amendments, and the Court would not have had to engage in the mental gymnastics it did.

The Court's decision in *Bolling* created other problems—textual, structural, and historical—for the Court. As John Hart Ely famously declared, reverse incorporation is "gibberish both syntactically and historically[.]"[12] Last Term, Justice Thomas called for *Bolling* to be re-examined.[13] The Equal Protection Clause is found in a sentence beginning with the words "No State shall," the Constitution's

11. *Bolling*, 347 U.S. at 499.

12. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 32 (1980); *see also* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 210 n.66 (1977) (referring to *Bolling* as "sheer fantasy"); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 233 (1980) ("I cannot think of a plausible argument against [*Bolling*]—other than the entirely correct originalist observation that it is not supported by even a generous reading of the fifth amendment."); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 711 (1975) ("There is no textual warrant for reading into the due process clause of the fifth amendment any of the prohibitions directed against the states by the equal protection clause.") (footnote omitted).

13. United States v. Vaello Madero, 142 S. Ct. 1539, 1547 (2022) (Thomas, J., concurring) ("[T]he text and history of the Fifth Amendment's Due Process Clause provide limited support for reading into that provision an equal protection guarantee."). Admitting that his "conclusions remain tentative," Justice Thomas suggested that "the Constitution may still prohibit the Federal Government from discriminating on the basis of race, at least with respect to civil rights[,]" but that the Citizenship Clause of the Fourteenth Amendment was the likely "textual source." *Id.*

principal device for signaling prohibitions on the states.[14] Despite the Court's own optimism that there was overlap between the Equal Protection Clause and the Due Process Clause, the framers of the Fourteenth Amendment considered and rejected a proposal that would have made the Equal Protection Clause applicable to the federal government,[15] and they made other provisions of the Fourteenth Amendment expressly applicable to the United States.[16] Furthermore, only a year earlier, the United States had ratified the Thirteenth Amendment, which was written in such a way that it applied both to the United States and the states,[17] and the Fifteenth Amendment plainly provided that "The right of citizens of the United States to vote shall not be denied or abridged *by the United States or by any State* on account of race, color, or previous condition of servitude[.]"[18] The omission of "the United States" from the Equal Protection Clause was neither inadvertent nor a scrivener's error; the conclusion that its omission was a conscious one is inescapable.

Despite the precision in our constitutional design, the Court has ignored these government–signaling devices, making its own improvements in the document through the process of "reverse incorporation."[19] We are most familiar with incorporation of the Bill of Rights, and the scholarship on incorporation is substantial.[20] That scholarship, critical and supportive, has focused carefully on

14. *See* U.S. CONST. art. I, § 10, cls. 1–3. The principal author of the Fourteenth Amendment, John Bingham, stated that in drafting Section 1 of the Fourteenth Amendment, he had "imitated the framers of the original Constitution[.]" CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871).

15. *See* BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865–1867 106 (1914) (reproducing the debates); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 276–79 (1997) (discussing proposed legislation). *See also infra* note 144.

16. U.S. CONST. amend. XIV, § 4 ("[*N*]*either the United States nor any State* shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States[.]") (emphasis added).

17. U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude . . . shall exist within the United States[.]"); *see* Civil Rights Cases, 109 U.S. 3, 20 (1883).

18. U.S. CONST. amend. XV (emphasis added).

19. This Article will generally use the term "incorporation" to refer to the process by which the Court took rights that the Constitution originally made applicable to the federal government alone in the Bill of Rights and applied them to the states. It will use the term "reverse incorporation" to refer to the process by which the Court took rights that the Constitution originally made applicable to the states alone and applied them to the federal government.

20. *See* Jay S. Bybee, *The Congruent Constitution (Part One): Incorporation*, 48 BYU L. REV. 1, 72–73 n. 7 (2022) (listing major books and articles on incorporation).

the textual and historical underpinnings of incorporation, which remains an ongoing process. In the past decade, including the past two Terms, the Court has declared provisions of the Second, Sixth, and Eighth Amendments to be applicable to the states as well.[21]

In contrast to the abundant scholarship on incorporation, little has been written about reverse incorporation. The Supreme Court's own self-reflective analysis of reverse incorporation has been woefully lacking, and there has been relatively little academic commentary as well. Moreover, the scholarship that we do have focuses, understandably, on the Equal Protection Clause.[22] Yet, the Equal Protection Clause is not the first instance of reverse incorporation—that would be the Contracts Clause, for which the road to reverse incorporation began as early as *Calder v. Bull* in 1798.[23] Although the Contracts Clause and the Equal Protection Clause are the most important examples of reverse incorporation, they are not the only instances where the Court has taken provisions specifically made applicable to the states by the Constitution and adopted the same standard for the federal government. To that list, we should add the right to travel, which originated in an amalgam of concerns over state interference with

21. Ramos v. Louisiana, 140 S. Ct. 1390, 1416 (2020) (holding that the Sixth Amendment's guarantee of a unanimous jury applies to the states); Timbs v. Indiana, 139 S. Ct. 682, 691 (2019) (holding that the Eighth Amendment's Excessive Fines Clause applies to the states); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (holding that the Second Amendment applies to the states).

22. *See, e.g.*, Akhil Reed Amar, *Constitutional Rights in a Federal System: Rethinking Incorporation and Reverse Incorporation*, *in* BENCHMARKS: GREAT CONSTITUTIONAL CONTROVERSIES IN THE SUPREME COURT 72 (Terry Eastland ed., 1995) [hereinafter Amar, *Rethinking Incorporation and Reverse Incorporation*]; Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 766 (1999) [hereinafter Amar, *Intratextualism*]; David E. Bernstein, Bolling, *Equal Protection, Due Process, and* Lochner*phobia*, 93 GEO. L.J. 1253 (2005); Dan T. Coenen, *Quiet-Revolution Rulings in Constitutional Law*, 99 B.U.L. REV. 2061, 2077–83 (2019); Gregory Dolin, *Resolving the Original Sin of* Bolling v. Sharpe, 44 SETON HALL L. REV. 749 (2014); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951 (2002); Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977); Michael J. Perry, Brown, Bolling, *& Originalism: Why Ackerman and Posner (Among Others) Are Wrong*, 20 S. ILL. U.L.J. 53, 69–72 (1995); Richard A. Primus, Bolling *Alone*, 104 COLUM. L. REV. 975 (2004); Peter J. Rubin, *Taking Its Proper Place in the Constitutional Canon:* Bolling v. Sharpe, Korematsu, *and the Equal Protection Component of Fifth Amendment Due Process*, 92 VA. L. REV. 1879 (2006); Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493 (2013); Bradford Russell Clark, Note, *Judicial Review of Congressional Section Five Action: The Fallacy of Reverse Incorporation*, 84 COLUM. L. REV. 1969 (1984).

23. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); *see infra* Section II.A.2.

federal powers,[24] but which the Court has said applies to the federal government through the Due Process Clause;[25] sovereign immunity, granted to the states in the Eleventh Amendment[26] and long recognized since then as shielding the federal government as well;[27] and, curiously, tort suits against federal agents for violation of constitutional rights,[28] a *statutory* right created by Congress under its Section 5 authority as a remedy for state violations of citizens' constitutional rights during Reconstruction.[29]

No study to date has considered reverse incorporation beyond *Bolling* and the Equal Protection Clause. When we examine the breadth of reverse incorporated rights, what we find is a Constitution that looks very different from the one designed by the framers in 1787 or 1866. Through reverse incorporation, the Court has systematically leveled the differences between the federal government and the states. Where the framers imposed a rule on states with respect to the impairment of contracts, the Court has created a parallel rule for the federal government. Where the framers added sovereign protections for the states in the form of the Eleventh Amendment, the Court has decreed that the federal government should have the same immunity. When, in the Fourteenth Amendment, the framers ordained that the states must provide "equal protection of the laws" to all persons and empowered Congress to enforce such protection, the Court decided that equal protection was exactly what had been in the Due Process Clause of the Fifth Amendment all along, and Congress's statutory enforcement mechanism—Section 1983—was also the proper remedy for enforcing such rights against federal agents. What emerges is a congruent Constitution—a set of unitary rules, determined by the Court, and applicable to both federal and state governments.

24. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868).

25. Shapiro v. Thompson, 394 U.S. 618 (1969).

26. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

27. Cohens v. Virginia, 19 (6 Wheat.) 264, 411–12 (1821).

28. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

29. Ku Klux Act of 1871, Pub. L. No. 42-22, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983).

Some members of the Court have questioned the effect such leveling has on the framers' design. As the Court declared multiple provisions of the Constitution congruent to protections secured under the Due Process Clauses of the Fifth and Fourteenth Amendments, some justices expressed concern that we had meddled with the structure of the Constitution. "'[I]ncongruity,'" wrote Justice John Marshall Harlan, "is at the heart of our federal system. The powers and responsibilities of the state and federal governments are not congruent; under our Constitution, they are not intended to be."[30] Justice Robert Jackson warned in the context of incorporation of the Bill of Rights that the process of making rights congruent "would lead to the dilemma of either confining the States as closely as the Congress or giving the Federal Government the latitude appropriate to state governments."[31] Justice Harlan added his own warning: incorporation threatened "compelled uniformity . . . achieved either by encroachment on the States' sovereign powers or by dilution in federal law enforcement of the specific protections found in the Bill of Rights."[32]

As a matter of public perception and policy, incorporation and reverse incorporation may be a popular answer. Perhaps congruency has brought us a workable set of unitary rules, making the Court's Constitution a sort of "best practices for governments" manual for "the citizens of all free governments[.]"[33] Maybe the unitary rules are like Spinoza's God, who was to the universe what the laws of circles are to all circles.[34] Or maybe, as Morton Horowitz once suggested, reverse incorporation is an application of "Gresham's Law of constitutional development whereby general principles drive out specific provisions."[35] These are dramatic poles. So which is it, and how can we be confident? Was there a method to the framers only forbidding the states from impairing the obligation of contracts? Might Congress, with its power to regulate commerce among the states, have authority to impair contracts in times of national emergency? Was there method to the framers of the Fourteenth Amendment forbidding the states from

30. Malloy v. Hogan, 378 U.S. 1, 27 (1964) (Harlan, J., dissenting).
31. Beauharnais v. Illinois, 343 U.S. 250, 294 (1952) (Jackson, J., dissenting).
32. *Malloy*, 378 U.S. at 16–17 (Harlan, J., dissenting).
33. Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230).
34. *See* BARUCH SPINOZA, ETHICS pt. II, props. VII, XXXVII-XL.
35. Morton J. Horowitz, *Is the Third Amendment Obsolete?*, 26 VAL. U.L. REV. 209, 214 (1991).

denying equal protection of the laws but standing silent with respect to Congress? Had the framers implicitly reserved to Congress the power to craft remedies based on race?

This Article asks us to pause before we conclude that a single set of rules should apply to federal and state governments. In the end, we may conclude, as Justice Scalia did with respect to incorporation of the Bill of Rights, that we must "acquiesce[] in the Court's incorporation of certain guarantees . . . 'because it is both long established and narrowly limited[,]'"[36] but we at least ought to ask whether we have upended the careful work of the framers in ways we might care about.

The Article proceeds as follows. In Part II, this Article catalogs clauses which have been subject to reverse incorporation. It begins with the two big ones: the Contracts Clause and the Equal Protection Clause. The history of the reverse incorporation of the Contracts Clause has not been told before; it is also long and complicated, but it teaches an important lesson, and it makes clear where the Court arrived. The reverse incorporation of the Equal Protection Clause, by contrast, was a simpler process, although its application to various suspect classes has not been as smooth. The Article breaks down the various classes entitled to strict or heightened scrutiny under the Equal Protection Clause and examines how reverse incorporation has affected constitutional analysis. It then addresses other rights that have been reverse incorporated, including the right to travel, sovereign immunity, and constitutional remedies. Finally, it considers additional provisions that could conceivably be reverse incorporated in the future, including the Privileges or Immunities Clause, the Due Process Clause, the Full Faith and Credit Clause, and the Guarantee Clause.

In Part III, this Article asks a series of questions about the implications of the congruent Constitution.[37] First, it asks questions about text and mechanics. In a Constitution in which language matters, how is it that rights described by clauses as disparate as

36. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (Scalia, J., concurring) (quoting Albright v. Oliver, 510 U.S. 266, 275 (1994) (Scalia, J., concurring)).

37. A word about terms. "Congruence" in this article takes two forms. First, rights are "substantively congruent" when the Court applies the same rule to the states and the federal government, irrespective of its textual source. "Textual congruence" means that the textual sources of a right are identical for both the states and the federal government.

the Contracts Clause and the Equal Protection Clause always turn out to be congruent to the liberties protected by the Due Process Clause? Is substantive congruence a more important value than textual coherence? And if the Due Process Clause is so capacious, why hasn't the Court squared everything up by declaring all rights found in the Constitution to be a subset of substantive due process, a process that would yield both substantive and textual congruence? Second, this Article asks questions about structure and federalism. In a Constitution in which keeping our lines of authority straight is critical to "Our Federalism,"[38] what is "unthinkable" about *not* having a congruent Constitution? What is unthinkable about a Constitution that maintains a federalist system in which different levels of government must obey different sets of rules and norms? What have we lost in reverse incorporation that might have been preserved had we debated these questions and proceeded by amendment (if at all) rather than judicial fiat? Third, this Article asks policy questions. Setting constitutional text and structure aside, what impels the Court to make the rights held against the states applicable to the federal government, and the rights held against the federal government applicable to the states? Is there something incoherent about federalism that drives the Court to congruence? In the end analysis, is there anything more at stake than the Court adopting congruent rules to serve popular perception and its own administrative convenience? This Article concludes that there is. Reverse incorporation has, clause by clause, vastly expanded the Court's checks on Congress and the Executive, and it has done so without the benefit of legislation or a constitutional amendment. The will to power is a strong impulse indeed, and reverse incorporation has forever altered our separation of powers.

The march of the Court has been, inexorably, to a unified set of rules. The result might be a congruent Constitution, one easily understood and administered from afar, but it is not a textually coherent Constitution. That fact should prompt us to reflect: If the text is so malleable, why have a written constitution at all?

38. Younger v. Harris, 401 U.S. 37, 44 (1971).

II. A HISTORY OF REVERSE INCORPORATION

This section on reverse incorporation begins with the history of the Contracts Clause's reverse incorporation because it has not been previously recounted. The Contracts Clause has a much older, more complex history than the reverse incorporation of the Equal Protection Clause, discussed in section II.B. The incorporation of the Contracts Clause began shortly after the ratification of the Constitution and long before we had an Equal Protection Clause. That history crosses multiple eras of the Court—antedating the Marshall Court and extending to the Roberts Court—and presents an exercise in the evolution of a reverse incorporated clause. The discussion of the Contracts Clause is followed with a review of the Equal Protection Clause and other rights, textual and atextual, that originally applied to the states and have since been applied to the federal government.

A. The Contracts Clause

1. Framing the Contracts Clause

The history of the drafting and ratification of the Contracts Clause is short, but it will give us some context for the Supreme Court's later developments.[39] Unlike many provisions in the Constitution, the Contracts Clause, as a general principle of law, does not have its origins in English or colonial law, but in post-Revolutionary War developments.

During the Constitutional Convention, Rufus King of Massachusetts "moved to add[] in the words used in the Ordinance of [Congress] establishing new States, a prohibition on the States to interfere in private contracts."[40] The "Ordinance" was the Northwest Ordinance, enacted just weeks earlier: "[N]o law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or

39. *See generally* JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY (2016); BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION (1938). One of the best summaries of the context for the Contracts Clause remains Justice Sutherland's dissent in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 454–65 (1934) (Sutherland, J., dissenting).

40. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 439 (Aug. 28, 1787) (Max Farrand, ed. 1966) [hereinafter FARRAND].

engagements, bona fide[,] and without fraud previously formed."[41] After some discussion over whether the rule was too restrictive, Pennsylvania's James Wilson emphasized that "*retrospective* interferences only are to be prohibited."[42] Madison then asked whether the principle would be accounted for if the Convention adopted an ex post facto provision, which the Convention had already approved, but only as to Congress.[43] Edmund Rutledge offered a substitute motion prohibiting the states from enacting bills of attainder and ex post facto laws.[44] When, the following day, one of the delegates reported that the two provisions would apply to criminal cases only, the Convention adopted the Contracts Clause in addition to the Bill of Attainder and Ex Post Facto Clauses and placed them in the first clause in Article I, Section 10.[45]

Rufus King had special reason to be concerned. The years leading to the Constitutional Convention had been difficult economically. Coming out of the Revolutionary War, the states themselves were under crushing debt. Individuals fared no better than their governments. Many states had responded by enacting debtor-relief laws, "including[] debt moratoriums; . . . laws allowing debts to be paid in commodities rather than hard currency; and laws requiring creditors to accept paper money (often of little value) as legal tender for the payment of debts."[46] Massachusetts, in particular, had seen the worst of it just months before in Shays' Rebellion. Cash-poor farmers from western Massachusetts, unable to pay their debts in hard currency, closed the courts by force rather than face debtors' courts or prison.[47]

41. An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio, art. II, (July 13, 1787), 1 Stat. 50, 52 (1789).

42. FARRAND, *supra* note 40, at 440 (Aug. 28, 1787).

43. *Id.*

44. *Id.*

45. *Id.* at 448–49 (Aug. 29, 1787).

46. Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 280–81 (1988).

47. *See* FORREST MCDONALD, E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC, 1776–1790, at 241, 244–57, 321–24 (1979); David Szatmary, *Shays' Rebellion in Springfield*, in SHAYS' REBELLION: SELECTED ESSAYS 1, 3–10 (Martin Kaufman, ed. 1987); ROBERT J. TAYLOR, WESTERN MASSACHUSETTS IN THE REVOLUTION 128–36, 143–49 (1954). *See also* Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contracts Clause*, 44 STAN. L. REV. 1373, 1380–83 (1992).

One danger in the state debtor-relief proposals was that state legislatures might favor local interests over out-of-state interests, that contracts entered into could be changed retroactively through legislation.[48] These debtor-relief efforts, while well-intentioned, threatened the stability of the economic system, especially if the banks declined to extend credit to borrowers who could avoid payment through subsequent legislation. "[T]here is little doubt" that "[state debtor relief] legislation was one of the major evils that the Clause was designed to eradicate."[49]

Absent from any extended discussion of the Contracts Clause were the answers to two questions: First, if it was salutary for the Contracts Clause to prevent the states from interfering with existing contracts, should the Clause be made applicable to the federal government as well? After all, the Constitution contained parallel prohibitions on enacting bills of attainder and ex post facto laws.[50] In fact, Elbridge Gerry had moved that a Contracts Clause be applied to the federal government as well, because Congress should be subject to "like prohibitions."[51] No one seconded the motion. Second, does the Contracts Clause apply to contracts with the government itself? The second question was important because the states, like the Continental Congress, had accumulated huge debt during the Revolutionary War. Did the Contracts Clause

Shays' Rebellion was the likely impetus for the obligation-of-contracts clause in the Northwest Ordinance as well. *See* John M. Merriam, *The Legislative History of the Ordinance of 1787*, 5 PROC. OF AM. ANTIQUARIAN SOC'Y 303, 331–32 (1889). *See also* 1 GEORGE TICKNOR CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES 548–50 (1889); DAVID MCCULLOUGH, THE PIONEERS 28–29 (2019) (pointing out that many provisions of the Northwest Ordinance were drawn from the Massachusetts Constitution, especially the Declaration of Rights); WRIGHT, *supra* note 39, at 6–8; Denis P. Duffey, Note, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 936–38 (1995).

48. In the South Carolina ratifying convention, Charles Pinckney argued that the Contracts Clause would make it possible for "citizens of the states [to] trade with each other without fear of tender-laws or laws impairing the nature of contracts." 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 335 (J. Elliot ed. 1881) (reprint 1996). *See also* THE FEDERALIST, No. 10, at 65 (James Madison) (Jacob E. Cooke, ed. 1961) (referring to the dangers of "a rage for paper money" and "an abolition of debts"); ATTICUS, ESSAY I (Aug. 9, 1787), *reprinted in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS, 1787–1788, at 332 & n.5 (Colleen A. Sheehan & Gary L. McDowell, eds. 1998) ("Let the people of this Commonwealth, give up their idle whim of *tender-acts*, and *legal alternation of bargains*[.]").

49. Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HAST. CONST. L.Q. 525, 533 (1987).

50. *Compare* U.S. CONST. art. I, § 9, cl. 3 *with id.* at art. I, § 10, cl. 1.

51. FARRAND, *supra* note 40, at 619.

guarantee payment on public debt? The Supreme Court addressed both questions quickly, the first in *Calder v. Bull*[52] and the second in *Fletcher v. Peck*.[53]

2. The Early Cases

Caleb Bull and his wife were the putative heirs under their grandson's will. When a Connecticut probate court refused to record the will, the Calders became the beneficiaries of the estate. The Bulls got the legislature to overturn the judgment of the probate court and grant them a new hearing. On rehearing, the court approved the will and awarded the estate to the Bulls. The Calders applied to the U.S. Supreme Court on the theory that the legislation violated the Ex Post Facto Clause.[54] Presumably, the Calders did not challenge the law on the basis of the Contracts Clause because it was not a contract, but a will, that was at issue. Nor could they challenge the law on the basis of the Takings Clause because that clause only applied to the federal government, and there was no Due Process Clause applicable to the states from which to launch a more general challenge. The Court, consistent with the discussion at the Constitutional Convention, held that the ex post facto prohibition only applied in criminal cases and affirmed the judgment. Although the Contracts Clause was not raised before the Court, Justice Samuel Chase discussed it in a general discussion of the rights of governments, state and federal:

> There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority . . . . A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; *a law that destroys, or impairs, the lawful private contracts of citizens*; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to

52. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (op. of Chase, J.). The Contracts Clause was mentioned in passing in two prior cases. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) (op. of Wilson, J.); Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 465 (1793) (op. of Wilson, J.); *id.* at 468 (op. of Cushing, J.).

53. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

54. U.S. CONST. art. I, § 10, cl. 1.

> entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it . . . . *To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy*, altogether inadmissible in our free republican governments.[55]

Chase's opinion has echoes of Madison's comments in *Federalist No. 44*:

> Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation . . . . [A]ll of them are prohibited by the spirit and scope of these fundamental charters.[56]

These were natural rights arguments,[57] but instead of couching them in terms of the rights of the individual, both Chase and Madison presented them as disabilities, acts no responsible government should take against its citizens. What is striking about both passages is how casually Chase and Madison include the impairment of contracts—a provision with no known history prior to the Northwest Ordinance—in the same rank as the Ex Post Facto and Bill of Attainder Clauses, whose provenance traced to Magna Carta. Chase in particular assumed that the Contracts Clause—or something like it—constrained the federal government equally with the states, and he likewise assumed that

55. *Calder*, 3 U.S. (3 Dall.) at 388–89 (op. of Chase, J.) (emphasis added) (emphasis omitted). There is no opinion for the Court, as the justices wrote *seriatim*.

56. THE FEDERALIST, No. 44, at 301 (James Madison) (Jacob E. Cooke, ed. 1961). *Cf.* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 303 (op. of Thompson, J.) ("Neither [the Ex Post Facto Clause nor the Contracts Clause] can strictly be considered as introducing any new principle . . . [but are] among the first principles of our government."); *id*. at 312 (referring to the Contracts Clause as a part of "universal law" and asking whether "the discharge of a contract [is] any greater violation of those sacred principles in a State legislature, than in that of the United States").

57. *See* RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION 47–48, 76–77 (2016) (describing Chase's statement as an example of natural rights and the principles of the social compact); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 648–51 (2009) (discussing *Calder* as an example of "higher-law constitutionalism").

the states cannot reallocate property, a principle accounted for in the Takings Clause.[58]

The Court first considered the Contracts Clause in detail in a case involving a state contract, *Fletcher v. Peck*.[59] The case arose out of the Yazoo land fraud. A corrupted Georgia legislature had sold thirty-five million acres in western Georgia—namely, Alabama and Mississippi—for well below its market value. Georgians reacted by getting a new legislature, which rescinded the sale by law. The issue before the Court was whether the law rescinding the sale impaired the obligation of the state's contract. The Court answered that it did. In the process, the Court held that public contracts, no less than private contracts, were subject to the Contracts Clause.[60] Curiously, although the Court struck down the Georgia legislation and squarely based its decision on the Contracts Clause, Chief Justice Marshall's opinion suggested a second ground, similar to the dicta in Justice Chase's opinion in *Calder v. Bull*, something akin to what we would call a vested or substantive due process right: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation."[61] The reference to "without compensation" was unmistakably a reference to the Takings Clause, but that clause bound the United States, not the states. The implication from Marshall's casual observation runs in two directions: In addition to the Contracts Clause, perhaps the states

58. *But see* Evans v. Eaton, 8 F. Cas. 846, 849 (C.C. Pa. 1816) (Washington, J.) ("[T]here is nothing in the constitution of the United States which forbids congress to pass laws violating the obligation of contracts, although such a power is denied to the states individually."), *rev'd,* 16 U.S. (3 Wheat.) 454 (1818).

Professor McConnell offers one explanation for why the Contracts Clause only applied to the states and the Takings Clause only applied to the federal government: "contractual rights [are] relatively more secure in the hands of the federal government and property rights relatively more secure in the hands of the states." McConnell, *supra* note 46, at 283. It was important to the national economy that debt "be transferrable in the national market." *Id.* at 286. By contrast, the taking of property was "an internal affair of the various states," and less likely to have national consequences. *Id.* at 293.

59. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137–39 (1810).

60. *Id.*

61. *Id.* at 135. *See* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 498–99, 509–10 (1997).

were also bound by a natural right captured in the Takings Clause.[62] And, even though the United States was bound by the Takings Clause, perhaps the same right in "the nature of society and of government" bound them to respect the obligation of contracts. By mixing and matching constitutional provisions, the Court was setting the stage for leveling the Constitution, for incorporation of the Takings Clause, and for reverse incorporation of the Contracts Clause.

During the nineteenth century, the Contracts Clause "appears to have generated more Supreme Court cases than any other constitutional provision."[63] The Court had firmly established in *Ogden v. Saunders* that the Contracts Clause barred legislatures from enacting laws that applied retroactively to existing contracts.[64] The Contracts Clause meant that contracting parties could fix their mutual "obligations" consistent with the law in force as of the time the contract was made. But *Fletcher v. Peck* sent the Contracts Clause down two paths of analysis: one for contracts between private parties where the state was alleged to have altered the rules for the contract and, a second, where the state was alleged to have impaired its own contract. Many of the latter decisions turned on the question of what laws the legislature could enact in the exercise of its general police powers without impairing the state's own obligations in contract, a very different inquiry from whether the state could retroactively Impair obligations created through private contracts.[65]

62. McConnell, *supra* note 46, at 272 ("Marshall solved the problem in *Fletcher* essentially by ignoring the textual difference between the contracts and just compensation clauses. If takings are also impairments of contract, and if impairments of contract are also takings, then the constitutional scheme seems to make little sense.") (footnote omitted).

63. Kmiec & McGinnis, *supra* note 49, at 535. *See also* WRIGHT, *supra* note 39, at xiii (Excluding the commerce clause cases, "the contract clause was the constitutional justification for more cases involving the validity of state laws than all of the other clauses of the Constitution together").

64. *See* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 259 (1827) (The state law at the time of contract "whether . . . written or unwritten . . . is emphatically the law of the contract made within the State, and must govern it throughout, wherever its performance is sought to be enforced.").

65. *See*, *e.g.*, Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430 (1869) (a promise of tax exemption could not be repealed by constitutional amendment); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837) (grant of right to collect tolls does not contain an implied right against state granting a competing right); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (legislation allowing appointment of additional members of the

3. The Civil War Cases

Prior to the Civil War, the Court had never applied the Contracts Clause to congressional legislation, but it certainly had hinted that the broad, natural-law principles at work in the Contracts Clause also applied to the federal government. The first formal statement that the Clause actually applied to Congress came just after the Civil War in a series of cases dealing with debts, public and private. In *Hepburn v. Griswold*,[66] Hepburn signed a promissory note in 1860 for $11,250. At the time, only gold and silver were lawful tender. In the Legal Tender Act of 1862,[67] Congress authorized payment in notes issued by the United States. When Griswold demanded payment, Hepburn tendered it in U.S. notes, which Griswold refused. The Court, in a divided decision, held that the Act was unconstitutional, and Griswold was not obligated to accept the notes in satisfaction of the debt.[68] The Court worked through fundamental constitutional questions, including whether Congress had the power to make paper legal tender. Congress had express power to "coin Money [and] regulate the Value thereof,"[69] but that was not the same "as the power to issue notes to be used as currency."[70] And although Congress had express power under the Articles of Confederation to issue bills of credit, it had not been granted the power to make them "legal tender in payment," "the power to issue notes and the power to make them a legal tender . . . not [being] the same power."[71] The Court also rejected the war powers as a basis for Congress's authority.[72] Failing to find express authority for Congress, the Court then asked "whether making bills of credit a legal tender . . . is consistent with the spirit of the Constitution" and declared that there was "no [principle] more

board impaired the corporate charter); New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812) (holding that courts should not imply a promise to grant a tax exemption in a land grant absent a clear statement in the contract).

66. Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870).

67. Legal Tender Act of Feb. 25, 1862, Pub. L. No. 37-33, ch. 33, § 1, 12 Stat. 345. The Constitutional Convention had considered giving Congress express power to issue bills on the credit of the United States. FARRAND, *supra* note 40, at 182.

68. The majority opinion was written by Chief Justice Salmon Chase, who was Secretary of the Treasury when the Legal Tender Act was passed.

69. U.S. CONST. art. I, § 8, cl. 5.

70. *Hepburn*, 75 U.S. (8 Wall.) at 616.

71. *Id.*

72. *Id.* at 617–21.

conspicuous or more venerable than the establishment of justice" and "what was intended by the establishment of justice . . . [was] not a matter of disputation. It is not left to inference or conjecture, especially in its relations to contracts."[73] The Court pointed to the interference-with-contracts language in the Northwest Ordinance and found "[t]he same principle found more condensed expression in that most valuable provision of the Constitution of the United States, ever recognized as an efficient safeguard against injustice, that 'no State shall pass any law impairing the obligation of contracts.'"[74] The Court acknowledged as

> true that this prohibition is not applied in terms to the government of the United States. . . . But we think it clear that those who framed and those who adopted the Constitution, intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution.[75]

The Court then added that it would consider "[a]nother provision, found in the [F]ifth [A]mendment," the Takings Clause, which was "kindred in spirit to that which forbids legislation impairing the obligation of contracts[.]"[76] The Court added that the Due Process Clause was found in the same provision and raised the question "whether an act which compels all those who hold contracts for the payment of gold and silver money to accept in payment a currency of inferior value deprives such persons of property without due process of law."[77] The Court had little difficulty answering the question. In its view, paper currency was inferior to gold and silver, and the act was no more lawful than

73. *Id.* at 622.
74. *Id.* at 622–23 (quoting U.S. CONST. art. I, § 10, cl. 1).
75. *Id.* at 623.
76. *Id.*
77. *Id.* at 624.

"an act enforcing the acceptance of fifty or seventy-five acres of land in satisfaction of a contract to convey a hundred[.]"[78]

Hepburn barely lasted the year before it was overturned in the *Legal Tender Cases*.[79] In the interim, Justices Bradley and Strong had joined the Court, and the appointments flipped the Court.[80] This time, the Court upheld the Legal Tender Act. Like the majority in *Hepburn*, the Court could not find express authority in the Coinage Clause for Congress to adopt the Act, but it ultimately held that there was no "implied prohibition" in the Clause.[81] From there the Court dismantled the structure erected in *Hepburn*. The Act did not "indirectly impair the obligation of contracts."[82] Such an argument assumed two things: First, that the Act impaired preexisting contracts and, second, that Congress was prohibited from doing so. The Court rejected both assumptions. As to the first, the Court held that there was no violation of any theoretical Contracts Clause prohibition, because "the obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made."[83] As to the second, the Court observed that there were many ways in which Congress, consistent with its lawful powers, might indirectly impair obligations: by enacting bankruptcy laws and waging war; "no obligation of a contract can extend to the defeat of legitimate government authority."[84] Nor was the Court persuaded by arguments based on the Takings or Due Process Clauses of the Fifth Amendment, which "referr[ed] only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."[85] The Court formally overruled *Hepburn*, with an explanation that the Court

78. *Id.* at 625. Justice Miller dissented. He argued that "[u]ndoubtedly it is a law impairing the obligation of contracts made before its passage. But while the Constitution forbids the State to pass such laws it does not forbid Congress." *Id.* at 637 (Miller, J., dissenting).

79. Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871).

80. *See* ELY, *supra* note 39, at 117–18 (discussing the change in the Court); Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 370–74 (1981) (discussing the background of the *Legal Tender Cases*).

81. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 547.

82. *Id.*

83. *Id.* at 548 (emphasis omitted).

84. *Id.* at 551.

85. *Id.*

did not do so "inconsiderately," but because it was "a case of such far-reaching consequences[.]"[86]

We might have thought that the Court's decisive action overturning *Hepburn* would have put an end to the notion of reverse incorporation of the Contracts Clause. But just eight years later in the *Sinking Fund Cases*,[87] the Court returned to a familiar theme. Chief Justice Chase was now gone, having been replaced by Morrison Waite, who authored the majority opinion. The Union Pacific Railroad had transported federal troops at an agreed price. The United States refused to pay the entire amount in cash, instead withholding one half of the debt for a sinking fund to retire the railroad's debt. The Court wasted no time in returning to the theme developed in *Hepburn*.

> The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation . . . .[88]

Although the Court upheld the Act, the Court had revived *Hepburn* and, for the first time, expressly tied Congress's obligation not to impair contracts to the Due Process Clause and, only secondarily,

86. *Id.* at 554. Chief Justice Chase dissented on a variety of grounds, including that the decision was "inconsistent with the spirit of the Constitution in that it impairs the obligation of contracts." *Id.* at 580 (Chase, C.J., dissenting). The Chief Justice also cited Justice Samuel Chase's dicta in *Calder*. *Id.* at 582. Justice Field also relied on the Contracts Clause in his lengthy dissent. *Id.* at 660–64 (Field, J., dissenting).

87. Sinking Fund Cases, 99 U.S. (9 Otto) 700 (1879).

88. *Id.* at 718–19. Portions of this passage were quoted with approval in *United States v. Union Pac. Ry. Co.*, 160 U.S. 1, 33–34 (1895), and in the dissent in *Can. S. Ry. Co. v. Gebhard*, 109 U.S. 527, 542–43 (1883) (Harlan, J., dissenting). *But see* Mitchell v. Clark, 110 U.S. 633, 643 (1884) ("It is no answer to say that it interferes with the validity of contracts, for no provision of the Constitution protects Congress from doing this, as it does the States . . . .").

Benjamin Wright's study of the Contracts Clause comments that "[w]hile the Sinking Fund cases involved an act of Congress and the contract clause was not properly concerned, the opinions of the Court read very much as if there were a clause of the kind limiting Congressional powers." WRIGHT, *supra* note 39, at 172 (footnotes omitted).

to the Takings Clause.[89] Furthermore, the *Sinking Fund Cases* applied the Contracts Clause principle in a case in which the United States had impaired its own contract. The *Legal Tender Cases* gave Congress leeway to impair contracts between private parties; the *Sinking Fund Cases* restricted that authority with respect to government contracts.

With the adoption of the Fourteenth Amendment in 1868, the Constitution contained two Due Process Clauses, one for the federal government and one for the states. Due process rights were now textually congruent and, presumably, substantively congruent. That meant due process guarantees found in Fourteenth Amendment cases applied to the federal government, and guarantees found in Fifth Amendment due process cases applied to the states. The Due Process Clause had become an efficient mechanism for, as Chief Justice Chase had said, "the establishment of justice."[90] The post-Civil War era brought rapid expansion of government. We entered a new phase marked by regulation of markets and industries. The Court would acquiesce in much of the new experiments in government. At the same time, the Court enlarged the reach of the Due Process Clause as a constraint on government. And as the Court moved into the era of substantive economic due process, contract rights remained an important focus of the Court. But the Court would approach them from a new angle. No longer was the Court concerned with whether a law impaired pre-existing contracts. The new "liberty of contract" "invalidat[ed] . . . *prospective* as well as *retrospective* economic legislation,

89. Three justices dissented and did not appear to challenge the premise that "Congress cannot directly abrogate contracts, or impair their obligation[.]" 99 U.S. (9 Otto) at 739 (Strong, J., dissenting). *See also id.* at 746 (Bradley, J., dissenting) (Congress may no more "pass arbitrary and despotic laws with regard to contracts . . . than with regard to any other subject-matter of legislation."); *id.* at 764–65 (Field, J., dissenting) ("[T]here are many considerations which lead to the conclusion that the power to impair contracts, by direct action to that end, does not exist with the general government.") (citing to Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870), and *Calder*, 3 U.S. (3 Dall.) 386 (1798)).

90. *Hepburn*, 75 U.S. (8 Wall.) at 622; *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 329 (1985) ("*Hepburn v. Griswold* . . . was an aberration. . . . *Hepburn*'s due process holding, on the other hand, while flatly repudiated in the *Legal Tender Cases* and later ignored, was the harbinger of an idea whose time was to come again.").

thereby rendering the Contract Clause largely superfluous."[91] Meanwhile, the Court said relatively little about reverse incorporation of the Contracts Clause, and what it said was consistent with the prior confusion.[92]

4. The New Deal Cases

The Contracts Clause, at least as applied to private contracts, was largely undone in the Minnesota mortgage moratorium case, *Home Building & Loan Ass'n v. Blaisdell*.[93] In the throes of the Great Depression, the Minnesota legislature enacted a law permitting a mortgagor to seek a judicial postponement of foreclosure "for such additional time as the court may deem just and equitable."[94] In one sense, the Minnesota mortgage moratorium act at issue in *Blaisdell* was a less rowdy version of Shays' Rebellion; it brought the people temporary relief from a crushing economic situation. The Court upheld the act and was surprisingly cryptic about the implications of its decision. Despite the extensive history of the Clause, the Court declared it among the "general clauses, which afford a broad

91. Kmiec & McGinnis, *supra* note 49, at 534. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 8.3.1, at 606 (2d ed. 2002) ("During the *Lochner* era, from about 1897 until 1937, the contracts clause was made superfluous by the Court's protection of freedom of contract under the due process clauses of the Fifth and Fourteenth Amendments.") (footnote omitted); WRIGHT, *supra* note 39, at 116 (by connecting due process to the impairment of contracts, the Court made "the obligation of contracts clause . . . almost, if not quite, superfluous").

92. *See, e.g.*, Block v. Hirsh, 256 U.S. 135 (1921) (upholding a rent control ordinance in the District of Columbia against a Takings Clause and due process challenge); Marcus Brown Co. v. Feldman, 256 U.S. 170 (1921) (upholding a rent control ordinance in New York City against a Contracts Clause challenge); *Block*, 256 U.S. at 159 (McKenna, J., dissenting in both cases) (after referring to the Due Process Clause of the Fifth Amendment and the Contracts Clause: "These provisions are limitations upon the national legislation . . . . We shall more or less consider the cases together, as they were argued and submitted on the same day and practically depend upon the same principles; and what we say about one applies to the other."); Atlantic Coast Line R.R. Co. v. City of Goldsboro, 232 U.S. 548, 558 (1914) ("[I]t is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community . . . .").

93. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). For background on various state moratoria prior to the Great Depression, see Charles Bunn, *The Impairment of Contracts: Mortgage and Insurance Moratoria*, 1 U. CHI. L. REV. 249 (1933); Clifford C. Hynning, *Constitutionality of Moratory Legislation*, 12 CHI.-KENT L. REV. 182 (1934); A.H. Feller, *Moratory Legislation: A Comparative Study*, 46 HARV. L. REV. 1061 (1933).

94. *Blaisdell*, 290 U.S. at 415–16 (quoting the Minnesota Moratorium Law, ch. 339, pt. 1, § 4 (1933)).

outline" and not a "grant or restriction . . . so particularized as not to admit of construction[.]"[95] In the end, it was sufficient that Minnesota had exercised its authority to "protect the vital interests of the community[,]" "[t]he legislation was addressed to a legitimate end," and the conditions imposed on mortgages "[did] not appear to be unreasonable."[96] Accordingly, the statute did not violate the Contracts Clause and "[w]hat has been said on that point is also applicable to the contention presented under the due process clause."[97]

Blaisdell simply merged the Contracts Clause into the Fourteenth Amendment's Due Process Clause. The two were now roughly equivalent, and the Due Process Clause supplied a less restrictive rule. Any question we might have had about reverse incorporation of the Contracts Clause through the Due Process Clause of the Fifth Amendment was, at least for the time being, mooted. There was textual congruence between the two Due Process Clauses, and the fact that the Contracts Clause was subsumed within the Due Process Clause of the Fourteenth Amendment meant that it was irrelevant—at least so far as private contracts were concerned.[98]

Blaisdell left open the question from *Fletcher v. Peck*: Was there still a role for the Contracts Clause when the state was a party to the contract? And, for our purposes, we would ask a second question: Assuming the Contracts Clause still had some bite, did it apply to federal contracts? The answer came in the same Term, just months after *Blaisdell*, in *Lynch v. United States*.[99] The plaintiffs were

95. *Id.* at 426. The tenor of the Court's opinion is best captured in its broad quoting of Marshall's opinion in *Ogden v. Saunders*, without noting that it was a dissent. *Id.* at 427–28 (quoting 25 U.S. (12 Wheat) 213, 354, 355 (1827) (Marshall, C.J., dissenting).

96. *Id.* at 444–45. *See also* Treigle v. Acme Homestead Ass'n, 297 U.S. 189, 197 (1936) ("Though the obligations of contracts must yield to a proper exercise of the police power . . . it must be exercised for an end which is in fact public and the means adapted must be reasonably adopted to the accomplishment of that end and must not be arbitrary or oppressive.") (footnotes omitted).

97. *Blaisdell*, 290 U.S. at 447–48. *See* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 597–98 (1935) (upholding a federal statute by applying *Blaisdell*). *See also* WRIGHT, *supra* note 39, at 115 ("Although [*Louisville Joint Stock Bank* concerned] an act of Congress, the Court took occasion to review its recent decisions under the contract clause . . . .").

98. *Blaisdell* did not leave the Contracts Clause entirely toothless, however. *See, e.g.*, *Treigle*, 297 U.S. 189; W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935); W.B. Worthen Co. v. Thomas, 292 U.S. 426 (1934).

99. Lynch v. United States, 292 U.S. 571 (1934).

insured under the War Risk Insurance Act of 1917, but the United States refused payment and, in the Economy Act of 1933, withdrew its consent to be sued on the policies. The plaintiffs claimed the Act violated their rights under the Due Process Clause. The Court found that the policies were valid contracts and, as such, property.[100] It then held that "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States" and quoted Chief Justice Waite's statement in the *Sinking Fund Cases* that the United States is as bound by its contracts as "a State or a municipality."[101] The Court then offered this teaser, reinforced by the use of passive voice: "Contracts between individuals or corporations are impaired within the meaning of the Constitution (Article 1, § 10, cl.1) whenever the right to enforce them by legal process is taken away or materially lessened. A different rule prevails in respect to contracts of sovereigns."[102] "Taken away or materially lessened" by whom? The states? The United States? Because *Lynch* involved a challenge to federal legislation, the point was useful only if the Contracts Clause applied to both the states and the United States. The Court evidently thought it did, and at the same time it signaled that *Lynch* was going to impose a more restrictive rule than *Blaisdell*.[103]

Lynch was followed the next Term by three cases sometimes referred to as the *Gold Clause Cases*.[104] Like the *Legal Tender Cases*, the *Gold Clause Cases* dealt with what could be exchanged as legal tender. In 1933, in a Joint Resolution, Congress nullified gold clauses—contracts requiring payment in gold coin—as "against public policy" and made such contracts dischargeable upon payment of "any coin or currency."[105] In the first of these cases,

100. *Id.* at 576, 579.

101. *Id.* at 580 (quoting the Sinking Fund Cases, 99 U.S. (9 Otto) 700, 719 (1879)).

102. *Id.* (footnote omitted).

103. The Court questioned whether Congress intended to deprive the insureds of their contractual rights or their remedy, a distinction that went back to *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 200–01 (1819). In light of intervening developments, the Court remanded the case. *Lynch*, 292 U.S. at 589.

104. Norman v. Balt. & Ohio R.R. Co., 294 U.S. 240 (1935); Nortz v. United States, 294 U.S. 317 (1935); Perry v. United States, 294 U.S. 330 (1935). A single dissent by four justices applied to all three cases. *Id.* at 361 (McReynolds, J., dissenting). *Lynch* and *Perry* are discussed in some detail in Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 GEO. WASH. L. REV. 633, 674–83 (1996).

105. *Norman*, 294 U.S. at 291 n.1 (quoting Joint Resolution to Assure Uniform Value to the Coins and Currencies of the United States, 48 Stat. 112, 113 (1933)).

Norman, the Court upheld the Joint Resolution on grounds that sounded much like *Blaisdell*. The Joint Resolution interfered with private contracts, and "[t]here is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt."[106] So long as Congress chose "an appropriate means to [a legitimate] end," the Court would only overturn the law if it was "arbitrary or capricious, that is, whether it has reasonable relation to [that] end."[107] In the third case, *Perry*, the Court faced a different issue: could Congress abrogate the contractual obligation of the United States to pay in gold? "There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties . . . and the power of the Congress to alter or repudiate the substance of its own engagements."[108] As it had done many times before, the Court again quoted the *Sinking Fund Cases* for the point that the United States was as bound by its contracts as a state, a municipality, or a citizen.[109] "Because the Government is not at liberty to alter or repudiate its obligations," the Joint Resolution was "beyond the congressional power."[110]

Between *Blaisdell* and the *Gold Clause Cases*, the Court had created a two-tier inquiry. Relying on *Blaisdell*, the Court used a rational basis test for claims that the government—whether state or federal—had impaired contracts between private persons. If, however, the government had impaired its own obligations under a contract, then, relying on *Lynch* and *Perry*, the Court would apply a stricter rule, although the precise test was still unclear. The two-tier inquiry distinguished between private contracts and government contracts; it did not distinguish between the rules to be applied to states and the rules to be applied to the United States. There may have been two tiers, but there appeared to be a single,

106. *Id.* at 309–10.

107. *Id.* at 311.

108. *Perry*, 294 U.S. at 350–51. *See also id.* at 353–54 ("Congress has not been vested with authority to alter or destroy those obligations.") (citing Lynch v. United States, 292 U.S. 571, 580, 582 (1934)).

109. *Id.* at 351 (quoting the Sinking Fund Cases, 99 U.S. (9 Otto) 700, 719 (1879)). The dissent quoted the same passage, as well as from Justice Strong's dissent. *Id.* at 380 (McReynolds, J., dissenting).

110. *Id.* at 354. The Court cited *Lynch* in support of the proposition that Congress could alter remedies but not its own obligations under the contract.

congruent rule for each tier, whether the state or the federal government caused the impairment.

5. The Revival of the Contracts Clause

The Contracts Clause underwent a modest revival in the mid-1970s,[111] but the developments only reinforced the two-tier inquiry. In two cases, *Usery v. Turner Elkhorn Mining Co.*[112] and *Allied Structural Steel Co. v. Spannaus*,[113] the Court dealt with challenges to federal and state laws, respectively, that allegedly impaired private contracts. In *Turner Elkhorn Mining*, mine operators brought a Fifth Amendment Due Process challenge to a federal law requiring them to compensate their miners for death or disability resulting from black lung disease. The Court asked only whether the "legislature ha[d] acted in an arbitrary and irrational way."[114] Citing *Blaisdell* and recognizing that the law affected "some retrospective effect," the Court held the measure "rational."[115] In *Allied Structural Steel*, the company challenged a Minnesota act that imposed new pension requirements on an existing pension plan. The Court acknowledged that the Contracts Clause had fallen into "comparative desuetude with the adoption of the Fourteenth Amendment,"[116] but insisted that "[i]f the Contract Clause is to retain any meaning at all . . . it must be understood to impose *some*

111. Between the New Deal cases and the 1970s revival, there were only a couple of hints of the prior controversies. *See* Thorpe v. Hous. Auth. of Durham, 393 U.S. 268, 278 n.31 (1969) ("Although the constitutional prohibition of the impairment of contracts, U.S. Const. Art. I, § 10, applies only to the States, we have held that '[v]alid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.'") (quoting *Lynch*, 292 U.S. at 579); Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 40–41 (1940) (finding no violation of the Contracts Clause; "Separate consideration of the objection to the legislation under the due process and equal protection clauses of the Fourteenth Amendment seems wholly unnecessary."). *See also Decisions*, 41 COLUM. L. REV. 1248, 1255 n.33 (1941) ("The interesting but open questions whether the test of reasonableness under the contract clause ought to be different from that under the due process clause; and whether, within the category of contract clause cases, there should be a distinction, in this respect, between cases involving contracts with the state and those involving purely private contracts, have not been clarified by the instant decision.") (referring to Wood v. Lovett, 313 U.S. 362 (1941)).

112. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

113. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

114. 428 U.S. at 15.

115. *Id.* at 16–18.

116. 438 U.S. at 241.

limits upon the power of a State."[117] Citing *Blaisdell*, the Court struck down the Minnesota act insofar as it applied to existing pension plans. The Court called the act a "severe disruption of contractual expectations" and held that the state had failed to show it was "necessary to meet an important general social problem."[118] That language—"important general social problem"—sounded more in heightened scrutiny than rational basis scrutiny, but the Court failed to explain if it was making any conscious change in the standard of review.[119]

During the same period, the Court took on two cases—one involving a state law; the other, a federal law—where the governments had arguably impaired their own contracts. The first of these was *United States Trust Company of New York v. New Jersey*,[120] in which New Jersey repealed a covenant between New York and New Jersey concerning rail transportation. In an opinion by Justice Blackmun, the Court conducted a broad survey of Contracts Clause cases and concluded that *Blaisdell* did not prescribe the rule when the state impairs its own contractual obligations; instead, the Court looked to the *Gold Clause Cases* in support of the "dual standard."[121] *U.S. Trust* appeared to invoke heightened scrutiny self-consciously, as a means to frame a higher standard of review.[122] On that basis, New Jersey could not retroactively repeal its

117. *Id.* at 242.

118. *Id.* at 247.

119. The Court's conclusion reflected the disorder:

> It is not necessary to hold that the Minnesota law impaired the obligation of the company's employment contracts "without moderation or reason or in a spirit of oppression." But we do hold that if the Contract Clause means anything at all, it means that Minnesota could not constitutionally do what it tried to do to the company in this case.

Id. at 250–51 (quoting *Kavanaugh*, 295 U.S. at 60) (footnotes omitted). *See* Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–12 (1983) ("If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation[.]") (citations omitted).

Justice Brennan dissented. He thought the Contracts Clause had "no applicability whatsoever to the Act" and that the "only relevant constitutional restriction [was] the Due Process Clause." 438 U.S. at 264 (Brennan, J., dissenting); *see also id.* at 251, 259–60, 262 n.9 (Brennan, J., dissenting).

120. U.S. Trust Co. v. New Jersey, 431 U.S. 1 (1977).

121. *Id.* at 23, 25–26 & n.25.

122. *See id.* at 32 (Burger, C.J., concurring) ("[T]he State must demonstrate that the impairment was essential to the achievement of an important state purpose."); *id.* at 53 n.16 (Brennan, J., dissenting) ("The Court makes clear that it contemplates stricter judicial review . . . .").

covenant with New York. Justice Brennan dissented and criticized the Court's standard, for mixing the words "reasonable" and "necessary" in the same standard.[123] But Justice Brennan also characterized the Contracts Clause as having a "federal counterpart, the Fifth Amendment."[124] The second case, *United States v. Larionoff*,[125] was a claim that the United States had reneged on re-enlistment bonuses. The Court decided in favor of the sailors on statutory grounds. But in the process, citing two of the *Gold Clause Cases*, *Lynch* and *Perry*, the Court invoked the doctrine of constitutional avoidance.[126]

This extensive history is an amalgam of the Contracts and Due Process Clauses, with little hope for finding a consistent and coherent set of principles. But whatever principles can be gleaned, the Court's treatment of the Contracts Clause in its brief opinion in *Pension Benefits Guaranty Corp. v. R.A. Gray & Co.* is inexplicable:

> [I]t is suggested that we apply constitutional principles that have been developed under the Contract Clause . . . when reviewing this federal legislation. *We have never held, however, that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of preexisting contracts.* Indeed, to the extent that recent decisions of the Court have addressed the issue we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses.[127]

123. *Id.* at 54 n.17 (Brennan, J., dissenting).

124. *Id.* at 53 n.16 (Brennan, J., dissenting). *See also id.* at 60–61 (Brennan, J., dissenting) (referring to "other constitutional doctrines . . . akin to the Contract Clause" and stating that during the *Lochner* era "this Court treated 'the liberty of contract' under the Due Process Clause as virtually indistinguishable from the Contract Clause" and that more recently "the Court wisely has come to embrace a coherent, unified interpretation of all such constitutional provisions").

125. United States v. Larionoff, 431 U.S. 864 (1977).

126. *Id.* at 879. *See* United States v. Winstar Corp., 518 U.S. 839, 875–76 (1996) (explaining the unmistakability doctrine as a constitutional avoidance doctrine with "Contract Clause origins").

127. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 732–33 (1984) (emphasis added).

The Court took no responsibility for the substantial confusion in the lower courts, many of which thought the Contracts Clause had been incorporated through the Fifth Amendment.[128]

The following year, in *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, the Court repeated the denial uttered in *R.A. Gray & Co.* and suggested that "to the extent the standards differ, a less searching inquiry occurs in the review of federal economic legislation."[129] Yet the Court itself continued to draw its standards from both state and federal impairment of contract cases.[130] And the Court announced that the party challenging the government act must show that it "acted in an arbitrary and irrational way," language that fit well within the

128. *Compare* Kennecott Corp. v. EPA, 684 F.2d 1007, 1016 (D.C. Cir. 1982) ("Though Article I, Section 10 of the Constitution is applicable only to the states, the courts have recognized a similar limitation present in the due process clause of the Fifth Amendment."); A-T-O, Inc. v. Pension Benefit Guar. Corp., 634 F.2d 1013, 1024 (6th Cir. 1980) ("As the contract clause of Article I, § 10 of the Constitution applies only to state legislation, this latter argument has force only to the extent that the contract clause principles may be incorporated into the Fifth Amendment."); Todd Shipyards Corp. v. Witthuhn, 596 F.2d 899, 904 (9th Cir. 1979) (Sneed, J., concurring) ("[T]he Supreme Court has renewed the suggestion that Fifth Amendment due process limits the power of the United States to abrogate its contractual obligations. It is not unreasonable to suppose that similar limits to the power of the United States exist with respect to the contractual obligations of others.") (citation omitted); Nachman Corp. v. Pension Benefit Guar. Corp., 592 F.2d 947, 959 (7th Cir. 1979) ("[S]everal authorities have suggested that the analysis employed in Contract Clause cases is also relevant to judicial scrutiny of Congressional enactments under the Due Process Clause. Both employ a means-end rationality test. However, since we are convinced that ERISA withstands the scrutiny employed under the Contract Clause cases, we need not decide whether the two clauses in fact impose identical restraints on legislative impairment of contracts.") (citations omitted); Speckmann v. Paddock Chrysler Plymouth, Inc., 565 F. Supp. 469, 473 (E.D. Mo. 1983) ("because [the act], as retroactively applied to defendant herein, does not violate the due process or takings clauses of the Fifth Amendment, it does not unconstitutionally impair defendant's right to contract, as those principles are incorporated into the Fifth Amendment."), *with* Todd Shipyards Corp., 596 F.2d at 903 ("[T]he Supreme Court has never held the Contract Clause applicable to federal as opposed to state action . . . . Moreover, even if the Contract Clause were incorporated into Fifth Amendment due process by analogy to Bolling v. Sharpe, 1954, 347 U.S. 497, that would not help Petitioners."); Pension Benefit Guar. Corp. v. Ouimet Corp., 470 F. Supp. 945, 956 (D. Mass. 1979) ("[*Allied Structural Steel*] is at least facially distinguishable, because ERISA is a federal law not subject to the strictures of the contract clause. In any event, the challenged provisions of ERISA meet the substantive tests imposed by [*Allied Structural Steel*].").

129. Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co, 470 U.S. 451, 472 n.25 (1985). *See also* Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 640–41 (1993) ("federal economic legislation . . . is not subject to constraints coextensive with those imposed upon the States by the Contracts Clause").

130. *Nat'l R.R. Passenger Corp.*, 470 U.S. at 471–72 & n.24.

Contracts Clause cases.[131] If anything has been clear in these cases, it is that the Court continues to recognize the two-tier distinction between government impairment of contracts between private parties and government impairment of its own contracts—and it has done so in both situations with citations to state and federal cases.[132]

6. Some Concluding Observations on the Contracts Clause

There are a number of observations we should entertain from this convoluted history. We have been wildly inconsistent in our administration of the Contracts Clause, but we have been quite consistent in thinking that the Contracts Clause is a "good government" provision, whose principles usefully apply to the federal government as well as the states. From Justice Samuel Chase to Chief Justice Salmon Chase, the Contracts Clause was thought to apply to the United States because it inhered in "the spirit of the Constitution"[133] and a contrary rule would be inconsistent with "our free republican government[]."[134] Those early cases, however, did not rely exclusively on natural rights principles but found sympathetic textual support in the Fifth Amendment's Takings and Due Process Clauses, and the three clauses were often discussed as though they were three faces of the same principle.

By 1868, we had textual congruence in the two Due Process Clauses, and by 1897, the Court had announced that the principle found in the Takings Clause applied to the states through the Fourteenth Amendment.[135] With congruence between two of the three clauses, did we even need the Contracts Clause? Curiously, even as the Court subsumed the Contracts Clause into the Due Process Clause, it never formally declared the Contracts Clause dead. The modern cases have reestablished the idea that the Contracts Clause remains a guarantee distinct from the Takings and Due Process Clauses.

131. *See, e.g.*, Treigle v. Acme Homestead Ass'n, 297 U.S. 189, 197 (1936); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 444–45 (1934).

132. *See, e.g.*, United States v. Winstar Corp., 518 U.S. 839, 875–76, 897 n.41 (1996) (plurality op. of Souter, J.); Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 55 (1986).

133. Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 623 (1870).

134. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).

135. *See* Chicago, Burlington, & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).

To assess the impact that reverse incorporation has had on the Contracts Clause, we are going to have to consider separately the two strands of the Clause: the impairment of the obligation of private contracts and the impairment of government contracts. These have been on separate courses since *Fletcher v. Peck*, and the modern cases have reinforced the point.

Let's start with the impairment of private contracts. It is difficult to compare the Court's stated test for state Contracts Clause cases[136] and its test for "a claim that federal economic legislation unconstitutionally impairs a private contractual right"[137] and see any daylight between the two.[138] The Court has simply drawn its principles from the same cases, without regard for whether those claims were brought under the Contracts Clause or the Due

136. Sveen v. Melin, 138 S. Ct. 1815, 1821–22 (2018):

> [T]his Court has long applied a two-step test. The threshold issue is whether the state law has "operated as a substantial impairment of a contractual relationship." . . . If [there is a] substantial impairment, the inquiry turns to the means and ends of the legislation. In particular, the Court has asked whether the state law is drawn in an "appropriate" and "reasonable" way to advance "a significant and legitimate public purpose."

(citing, *inter alia*, *Allied Structural Steel Co.*, 438 U.S. at 244 and Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411–12 (1983)) (citations omitted).

137. Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 472 (1985).

> [T]he party complaining of unconstitutionality has the burden of demonstrating, first, that the statute alters contractual rights or obligations . . . . [Second,] if the impairment is substantial, a court must look more closely at the legislation . . . . The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and establish that the legislature has acted in an arbitrary and irrational way.

Id. (citing, *inter alia*, *Allied Structural Steel* and *Energy Reserves Group*) (quotation marks and citations omitted).

138. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 613 n.1 (2d ed. 1988) ("Although no explicit constitutional language similarly protects the sanctity of contract against federal legislation, the fifth amendment's due process clause was once thought to have essentially the same effect."); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 695 (1960) ("[S]everal cases have indicated that the standard of reasonableness under the contract clause is the same as that utilized in determining the validity of retrospective legislation under the due-process clauses of the fifth and fourteenth amendments.") (footnote omitted); Robert L. Hale, *The Supreme Court and the Contract Clause: III*, 57 HARV. L. REV. 852, 890–91 (1944) ("[T]here is at least a tendency for the contract clause and the due process clause to coalesce. Although there is no clause expressly forbidding the federal government to pass laws impairing . . . them in a manner which the Supreme Court deemed unreasonable would doubtless be held to be deprived of property without due process, contrary to the Fifth Amendment."). *See also* Frank H. Easterbrook, *Bills of Rights and Regression to the Mean*, 15 HARV. J.L. & PUB. POL'Y 71, 79 (1992).

Process Clause. The federalism implications of that congruence are two-fold.

First, the fact that the Court still believes there is some role for the Contracts Clause affects federal powers. Take *Blaisdell* as an example. The Contracts Clause as originally understood undoubtedly would have prohibited Minnesota from impairing the enforcement of mortgages by declaring a temporary moratorium on their enforcement. Absent reverse incorporation, however, there would have been nothing to prevent Congress from stepping in and enacting—through some combination of its authority to regulate commerce among the states or to provide for uniform bankruptcy rules—a nationwide rule concerning mortgage relief. The framers expressed concern about debt relief, but one special concern was self-protectionist legislation for debtors of the state against lenders in another state. A national rule would, presumably, have accounted for the interests of both sides.[139] Permitting Congress to enact mortgage relief, while denying the power to the states, works no violence to the original Constitution.

Second, it follows from this point that reverse incorporation also affected the Contracts Clause as applied to the states. In the post-Civil War era, as the role of government expanded, the Court had to restrain its understanding of the impairment of contracts (whether it was considering the Contracts Clause or the Due Process Clause), because the same rule would restrain the federal government. Congruence in this context meant that the states were likely to be subject to fewer constraints through the Contracts Clause than they would absent congruence, so that the Clause did not impede federal expansion. In sum, we may have a congruent rule, but we have a Contracts Clause that applies to the federal government when it should not, and a much-weakened Contracts Clause with respect to the states.

The current state of affairs with respect to government impairment of its own contracts is less clear. The rule of *Fletcher v. Peck* was a bit

139. *See* Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597, 613 (1987) ("When the government impairs a private obligation, it has no direct stake in the outcome, and hence can act as a fair and impartial arbiter between conflicting interests."). This helps explain the "puzzle" as to why the Contracts Clause was not applied to the United States. *See* Joseph E. Simmons, Comment, *Reconstructing the Bankruptcy Power: An Originalist Approach*, 131 YALE L.J. 306, 315–16 (2021).

of a curve in the development of Contracts Clause jurisprudence. There is evidence that the framers assumed the Clause would apply only to private contracts, and there is no evidence to the contrary.[140] In some respects, the Takings Clause might have been a better fit for the situation, but the Takings Clause was not a solution for Georgia's Yazoo Land Fraud. In any event, there may be differences between the states and the federal government that would explain the framers' decision not to apply the Contracts Clause to the federal government, but there is no apparent federalism-based reason the framers could not have made the Takings Clause applicable to the states.[141] So we have fewer federalism concerns with reverse incorporation of the Contracts Clause with respect to a government's impairment of its own contracts than we do with applying the Contracts Clause to the federal government's impairment of private contracts.

The current test for such state impairment of its own contracts is some kind of heightened scrutiny,[142] while the test for federal impairment is under development. The Court explained in *United States v. Winstar* that "the want of more developed law on limitations independent of the Contract Clause" is the result of the Court employing various doctrines of constitutional avoidance "to avoid this doctrinal thicket."[143] One suspects that the use of the constitutional avoidance doctrine is a soft confession that the federal standard may be very close to the state standard.[144] Indeed, there is no federalism-based reason why there should be different standards for state contracts and federal contracts. But even if the Court ultimately holds the states to a higher standard than the federal government, for years the standards have been nearly congruent if not identical. This suggests that to the extent due process has drawn from the lessons of the Contracts Clause, it is a broader restraint on Congress than it would have been otherwise.

140. *See* CURRIE, *supra* note 90, at 135 & n.78.

141. *McConnell*, *supra* note 46, at 282–83, 293.

142. U.S. Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977).

143. United States v. Winstar, 518 U.S. 839, 876 (1996) (plurality op. of Souter, J.).

144. *See* Brenner M. Fissell, Note, *The Dual Standard of Review in Contracts Clause Jurisprudence*, 101 GEO. L.J. 1089, 1104 (2013) ("While *Winstar* involved the Federal government (not a state) and therefore did not directly implicate the Contracts Clause, the Due Process challenge in the case proceeded along familiar Contracts Clause parameters.").

Finally, because the Court has never formally declared the Contracts Clause incorporated against the federal government, it can reverse course at any time. That would require giving the Contracts Clause meaning independent of the Due Process Clause—a scenario more likely with respect to private contracts than public contracts. There is some movement in this direction,[145] but it would be a dramatic departure from our history.

B. The Equal Protection Clause

The Equal Protection Clause is the textbook example of reverse incorporation. This section begins with some background on the Clause and will then cover the path to reverse incorporation. It then takes up the various classes subject to heightened scrutiny in an effort to understand whether there are federalism principles lurking in the Equal Protection Clause that make congruent application of the Equal Protection Clause to the federal government unworkable, or at least awkward.

1. Framing the Equal Protection Clause

In May 1866, Pennsylvania Republican Thaddeus Stevens introduced a proposal for what would become our Fourteenth Amendment. Representative Stevens explained the new promise of equal protection:

> Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same.[146]

The phrase "equal protection" was not a fixture in the American lexicon. In the *Case of Fries*, Justice Samuel Chase lectured the defendant, accused of treason:

> Your government secures to every member of the community equal liberty and equal rights; by which equality of liberty and rights, I mean, that every person, without any regard to wealth,

145. Sveen v. Melin, 138 S. Ct. 1815, 1826–28 (2018) (Gorsuch, J., dissenting).

146. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (statement of Rep. Stevens).

> rank, or station, may enjoy an equal share of civil liberty, and equal protection of law, and an equal security for his person and property.[147]

But there are few other references to guide us. The phrase "equal protection" appeared in Ohio Republican John Bingham's original proposal for the Fourteenth Amendment,[148] which had been tabled,[149] and the recently enacted Civil Rights Act had referred to the right to "full and equal benefit of all laws and proceedings for the security of person and property."[150]

The new Equal Protection Clause attracted relatively little attention in the debates of 1866. Indeed, Representative Baker termed it "simple justice" and "so obviously right."[151] There also seemed to be general agreement that the Clause was about protection of persons and property.[152] During the civil rights enforcement

147. Case of Fries, 9 F. Cas. 924, 932 (C.C. D. Pa. 1800) (No. 5127). *See also In Re* Ralph, 1839 WL 2764 (Iowa 1839) (referring to "the laws, which extend equal protection to men of all colors and conditions"). I found only scattered use of the phrase in cases prior to 1866, without finding a common usage.

148. Bingham's proposal read:

> ARTICLE —. The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (statement of Rep. Bingham). Before Bingham introduced his proposal, a Joint Committee of Fifteen on Reconstruction, of which both Bingham and Stevens were members, had considered an amendment that would have applied to the states and the United States. Section 1 of that proposal read: "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." KENDRICK, *supra* note 15, at 83. Bingham himself moved to strike that section and substitute the proposal he eventually put before the House of Representatives. *Id.* at 106.

149. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866) (statement of Rep. Bingham).

150. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

151. CONG. GLOBE, 39th Cong., 1st Sess. app. 256 (1866) (statement of Rep. Baker). Representative Bingham argued that equal protection was already part of the Constitution. *Id.* at 1034 (statement of Rep. Bingham). Representative Stevens agreed but claimed that it did not apply to the states and the Fourteenth Amendment would correct that. *Id.* at 2459 (statement of Rep. Stevens). *See* Vance v. Bradley, 440 U.S. 93, 94–95 n.1 (1979) (noting these instances and concluding "[a]ccordingly, the Court has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws[]").

152. Senator Jacob Howard introduced the proposed amendment in the Senate, in language similar to Representative Stevens:

> [The Equal Protection Clause] abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable

debates in 1871, the ever-reasonable James Garfield called the Equal Protection Clause "the chief and most valuable addition made to the Constitution in the section." He said the Equal Protection Clause governed in two cases: where the "laws of the State are unequal," by which he likely meant laws discriminatory on their face,[153] and where there is "a systematic maladministration of [the laws], or a neglect or refusal to enforce their provisions[.]"[154] Such a common-sense reading was reflected in the Privileges or Immunities Clause itself, which forbid the states to "*make* or *enforce*"[155] certain kinds of laws, an obvious reference to state legislation and executive/judicial action.[156] The enforcement debates of 1871 were more vigorous and textually rigorous than the

> to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.

Id. at 2766 (statement of Sen. Howard). *See also* CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871) (statement of Sen. Edmunds) (referring to "equality of protection"); *id.* at app. 182 (statement of Rep. Mercur) (stating that "the great end to be reached is 'protection'").

A number of studies support the idea that the original understanding of the Equal Protection Clause was about "protection." *E.g.*, Alfred Avins, *The Equal "Protection" of the Laws: The Original Understanding*, 12 N.Y.L.F. 385 (1966); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1433–51 (1992); Earl A. Maltz, *The Concept of Equal Protection of the Laws – A Historical Inquiry*, 22 SAN DIEGO L. REV. 499 (1985). The most comprehensive study is Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C. R. L.J. 1 (2008) and Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON C.R. L.J. 219 (2009). *See also* United States v. Vaello Madero, 142 S. Ct. 1539, 1550–51 nn. 3–4 (2022) (Thomas, J., concurring).

153. CONG. GLOBE, 42d Cong., 1st Sess. app. 153 (1871) (statement of Rep. Garfield). *See id.* at app. 69 (1871) (statement of Rep. Shellabarger) (referring to "exact equality upon the face of the laws"); *id.* at app. 300 (statement of Rep. Stevenson) ("[T]he benefit secured is the 'protection' of the laws, and this requires their execution."); *id.* at app. 315 (statement of Rep. Burchard) (discussing the difference between "a law discriminating against any portion of its citizens" and when "statutes show no discrimination, yet in its judicial tribunals one class is unable to secure that enforcement of their rights"). *See also* CONG. GLOBE, 39th Cong., 1st Sess. 1121(1866) (Rep. Rogers) (providing examples of unequal laws, including laws that prescribed greater punishment for Blacks than whites); *id.* at 1160 (statement of Rep. Windom) (same).

154. CONG. GLOBE, 42d Cong., 1st Sess. app. 153 (1871) (statement of Rep. Garfield). *See also id.* at app. 115–16 (statement of Rep. Farnsworth); *id.* at 581 (statement of Sen. Trumbull); CONG. GLOBE, 39th Cong.,1st Sess. 1292 (1866) (statement of Rep. Bingham) (referring to "the administration of justice for the protection of life"; arguing that it must extend to aliens as well as citizens); *id.* at 1293 (arguing that the Civil Rights Act would forbid discrimination on account of race or color in "the penalties prescribed by their laws").

155. U.S. CONST. amend. XIV, § 1 (emphasis added).

156. Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1053 (2011).

debates of 1866, and the Equal Protection Clause was the subject of dispute, but those debates were less about what "equal protection" meant and more about whether Congress had the power to enforce the Clause through Section 5. In the end, Congress opted for its own authority and enacted the Ku Klux Act, which made it criminal for two or more persons to conspire to deprive "any person or any class of persons of the equal protection of the laws."[157]

2. The Early Cases

There were two cases that altered the path of the Equal Protection Clause. One case affected it indirectly, but profoundly; the other directly, but subtly. The first case was the *Slaughter-House Cases*.[158] The second was *Yick Wo v. Hopkins*.[159]

Slaughter-House is canonical, but for all the wrong reasons. In its first opportunity to construe the new Fourteenth Amendment, the Court misread it. Perhaps history would have turned out differently if the Court's first case had been one involving race, but instead the case turned on a monopoly conferred by Louisiana to maintain a slaughterhouse in New Orleans. The petitioners claimed that the monopoly violated their rights under the Thirteenth Amendment and the Privileges or Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment.[160] For our purposes, only the Court's holding on the Privileges or Immunities Clause is relevant. The Court read the Citizenship Clause of Section 1—which was intended to overrule *Dred Scott*'s holding that Blacks could never become citizens—as creating two distinct classes of citizenship, national and state.[161] The Court then held that the

157. Act of Apr. 20, 1871, ch. 22, § 2, 17 Stat. 13 (codified, as amended, at 42 U.S.C. § 1985(3)). *See* Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 1966 DUKE L.J. 415, 419–20 (1966).

158. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

159. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

160. *Slaughter-House Cases*, 83 (16 Wall.) at 66.

161. "[O]nly the [privileges or immunities of federal citizenship] are placed by this clause under the protection of the Federal Constitution, and [the privileges or immunities of state citizenship], whatever they may be, are not intended to have any additional protection by this paragraph of the amendment." *Id.* at 74. Justice Bradley, in dissent, explained the first clause of Section made "citizenship of the United States . . . the primary citizenship in this country; and . . . State citizenship . . . secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence." *Id.* at 112 (Bradley, J., dissenting).

"privileges or immunities of citizens of the United States" prevented state interference with rights of distinctively national citizenship.[162] In the process, the Court ignored the obvious link between the "privileges or immunities" in Section 1 and the "privileges and immunities" in Article IV, which had been the basis for so much discussion in Congress.[163] The Court then proceeded to describe the privileges or immunities of U.S. citizenship, which the Court viewed as including the right to travel, protection while abroad, and habeas corpus, none of which the states could abridge under the Privileges or Immunities Clause. By so limiting the privileges or immunities protected by the Clause, the Court had effectively read the Privileges or Immunities Clause out of the Fourteenth Amendment.[164] The immediate import was that either the Fourteenth Amendment was hobbled, or the Court would have to find another mechanism within the Fourteenth Amendment to accomplish its purposes. Over time, the Court found two such tools in the Due Process and Equal Protection Clauses.[165]

Ryan Williams has argued that the Citizenship Clause conferred "full legal equality with respect to 'fundamental' civil rights." Williams, *supra* note 22, at 501. Justice Thomas has recently, but tentatively, suggested a similar reading. United States v. Vaello Madero, 142 S. Ct. 1539, 1547–51 (2022) (Thomas, J., concurring).

162. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 74–75.

163. "[The privileges or immunities of state citizenship] are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government[.]" *Id.* at 78. *See also* Edwards v. California, 314 U.S. 160, 182 (1941) (Jackson, J., concurring) ("[T]he hope proclaimed [in the Privileges or Immunities Clause] soon shriveled in the process of judicial interpretation.").

164. Justice Field wrote the principal dissent. Drawing on the Civil Rights Act of 1866, he pointed out that the Privileges or Immunities Clause did not confer any new rights on citizens; "[i]t assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation." *Slaughter-House Cases,* 83 U.S. (16 Wall.) at 96 (Field, J., dissenting).

165. *See* CURRIE, *supra* note 90, at 383 ("[A]fter the narrow construction given the [Privileges or Immunities Clause] in *Slaughter-House*, equal protection was the only remaining avenue for accomplishing the [f]ramers' purpose.").

The Court almost immediately began entertaining suits under the Equal Protection Clause that had nothing to do with either race or laws protecting security of persons or property. *See, e.g.*, Munn v. Illinois, 94 U.S. (4 Otto) 113, 134–35 (1876) ("Certainly, it cannot be claimed that this prevents the State from regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction."). Even Justice Field, who had dissented in *Slaughter-House* was resigned to the fact that the promise of equality "embraces an almost infinite variety of subjects." *Id.* at 145 (Field, J., dissenting).

The process of making the Equal Protection Clause do the work of the Privileges or Immunities Clause took an important rhetorical step in *Yick Wo*. *Yick Wo* was not the Court's first substantive engagement with the Equal Protection Clause. That had come in *Strauder v. West Virginia*, where the Court held that a state denies the equal protection of the laws when it denies black defendants the right to have a jury selected from black and white citizens.[166] The Court asked, rhetorically, "how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race . . . is not a denial to him of equal legal protection?"[167] *Strauder* addressed the most obvious problem of unequal laws: laws that discriminated on their face. *Yick Wo* addressed the second problem mentioned by members of Congress in the debates: the maladministration of the law. Yick Wo was a Chinese citizen operating a laundry in San Francisco. A city ordinance prohibited wooden laundries unless they had a permit, which were routinely granted to white-operated laundries, but not to the Chinese, apparently without any reasonable explanation for the difference. For the Court, the City's enforcement bespoke "unequal and unjust discrimination in their administration." The ordinance was "applied and administered by public authority with an evil eye and an unequal hand."[168] The decision was well within the scope of the Equal Protection Clause, as described in the various congressional debates. The subtle shift in the Equal Protection Clause came in a clever turn of phrase: "the equal protection of the laws is a pledge of the protection of equal laws."[169] The Court had moved the adjective "equal" from "protection" to "laws." To be sure, the framers of the Fourteenth Amendment had referred to the need for "equal laws," but by moving the adjective to the end of the sentence, the Court had remade the Equal Protection Clause, a clause the framers thought secured the physical protection of

166. Strauder v. West Virginia, 100 U.S. 303 (1880).

167. *Id.* at 309.

168. Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886). *See also* Soon Hing v. Crowley, 113 U.S. 703, 709 (1885) (referring to the "equal right" in the "enforcement of the laws"); Pace v. Alabama, 106 U.S. 583, 584 (1883) ("Equality of protection under the laws implie[d] . . . that in the administration of criminal justice he shall not be subjected, for the same offence, to any greater or different punishment.").

169. *Yick Wo*, 118 U.S. at 369 (1886). *See* Harrison, *supra* note 152, at 1390 (referring to the phrase as "textual sleight of hand").

persons and property, into an Equal Laws Clause, a clause having nearly universal application. It would have to do as a substitute for the late Privileges or Immunities Clause.

3. The Road to Reverse Incorporation

With the adoption of the Fourteenth Amendment in 1868, we had textually congruent Due Process Clauses. The debates of 1866 had at least planted the idea that the new amendment might incorporate the first eight amendments, making them applicable to the states.[170] Even *Slaughter-House* hinted that "[t]he right to peaceably assemble and petition for redress of grievances" was among the rights of U.S. citizenship protected by the Privileges or Immunities Clause.[171] During the same period, as we have seen, the Court had a false start on the idea that the Due Process Clause of the Fifth Amendment incorporated the Contracts Clause. Seeds of reverse incorporation had been planted.

The first signs of reverse incorporation of the Equal Protection Clause came in dicta in *Gibson v. Mississippi*,[172] a challenge to nonracial qualifications for jurors. The first Justice Harlan wrote for the Court that the Constitution forbids "discrimination by the General Government, or by the States, against any citizen because of his race. All citizens are equal before the law."[173] The reference to "the General Government" was, like Justice Samuel Chase's dicta in *Calder v. Bull*,[174] gratuitous, but it was an important signal. The following Term, the Court began the deliberate process of making the rights codified in the Bill of Rights applicable to the states,[175] a process Justice Field, Justice Harlan, and others had advocated.[176] Nevertheless, as equal protection arguments crept into challenges

170. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 181–87 (1998).

171. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873).

172. Gibson v. Mississippi, 162 U.S. 565 (1896).

173. *Id.* at 591.

174. *See supra* note 52 and accompanying text.

175. Chicago, Burlington, & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897) (holding that the Due Process Clause requires states to pay just compensation for takings). *See* Bybee, *supra* note 20, at 78–81.

176. Field and Harlan argued that the amendments were made applicable to the states through the Privileges or Immunities Clause. *See* Patterson v. Colorado, 205 U.S. 454, 464–65 (1907) (Harlan, J., dissenting); O'Neil v. Vermont, 144 U.S. 323, 361–63 (1892) (Field, J., dissenting); *id.* at 370–71 (Harlan, J., dissenting).

to federal legislation, the Court repeatedly denied that the Equal Protection Clause applied to the federal government.[177] At the same time, the Court was willing to assume, *arguendo*, that the Fifth Amendment's Due Process Clause was "equivalent to the 'equal protection of the laws' clause of the Fourteenth Amendment,"[178] but the Court only so assumed in cases where it denied the equal protection claim.

Most of the cases gave short shrift to the argument. There were two exceptions. The first was *Truax v. Corrigan*,[179] a challenge to an Arizona law regulating injunctions in a labor dispute. In a thoughtful opinion, Chief Justice Taft compared the Due Process and Equal Protection Clauses. Admitting that they may "overlap," he wrote that "the spheres of the protection they offer are not coterminous."[180] The Due Process Clause "requires that every man shall have the protection of his day in court" through the "benefit of the general law," which "tends to secure equality of law."[181] The Equal Protection Clause, by contrast, "was aimed at undue favor and individual or class privilege" and "sought an equality of treatment of all persons, even though all enjoyed the protection of due process."[182] The second case was *United States v. Carolene Products Co.*[183] in which the Court first suggested the possibility of "a more searching judicial inquiry" into political processes that result in prejudice against "discrete and insular minorities."[184]

What is curious about *Carolene Products* is that the Court dismissed the equal protection argument against the federal Filled Milk Act of 1923 with the simple declaration that "[t]he Fifth Amendment has no equal protection clause" (and, it might have

177. *See, e.g.*, Detroit Bank v. United States, 317 U.S. 329, 337 (1943); Helvering v. Comm'r of Internal Revenue, 314 U.S. 459, 468 (1941); Sunshine Anthracite Coal Co., v. Adkins, 310 U.S. 381, 401 (1940); Currin v. Wallace, 306 U.S. 1, 14 (1939); Steward Mach. Co. v. Davis, 301 U.S. 548, 584 (1937); Truax v. Corrigan, 257 U.S. 312, 340 (1921); LaBelle Iron Works v. United States, 256 U.S. 377, 392 (1921); Second Emps. Liab. Cases, 223 U.S. 1, 52–53 (1912).

178. *Second Emps. Liab. Cases*, 223 U.S. at 52–53. *See also Detroit Bank*, 317 U.S. at 338; *Currin*, 306 U.S. at 14; *Steward Mach. Co.*, 301 U.S. at 584–85; *LaBelle Iron Works*, 256 U.S. at 392–93.

179. Truax v. Corrigan, 257 U.S. 312 (1921).

180. *Id.* at 332.

181. *Id.*

182. *Id.* at 332–33.

183. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

184. *Id.* at 152–53 n.4.

added, the argument would not have worked anyway).[185] That declaration appeared in part two of the opinion. The most important footnote in U.S. history, footnote four, appears in part three, which dealt only with a due process claim, not an equal protection claim. Furthermore, footnote four refers to the Fourteenth Amendment and does not mention the Fifth Amendment, an odd reference where the suit only challenged federal legislation. Accordingly—and ironically—the antecedent for our three tiers of equal protection scrutiny, today applied to federal and state action, comes from a case in which the Court denied that the equal protection principle even applied to the federal government.

None of these cases really tested the Court's resistance to reverse incorporation. The cases involved railroad regulations, adulterated food, and taxing provisions, all matters well within the ordinary ken of the government. Race had not been a factor in these cases. That changed in *Hirabayashi*[186] and *Korematsu*.[187] *Hirabayashi* involved a challenge to a West Coast curfew order enforced only against persons of Japanese ancestry. The Court noted, as it had many times before, that "[t]he Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process."[188] Nevertheless, citing *Yick Wo*, the Court acknowledged that "legislative classification or discrimination based on race alone has often been held to be a denial of equal protection[,]" and it was willing to "assume that these considerations would be controlling here[,]" but denied that "Congress and the Executive are wholly precluded from taking [Japanese ancestry] into account[.]"[189] A year later, in *Korematsu*, the Court dropped all pretensions. Without referring to either the Due Process or Equal Protection Clauses, the Court announced that "all legal restrictions which curtail the civil

185. *Id.* at 151.

186. Hirabayashi v. United States, 320 U.S. 81 (1943).

187. Korematsu v. United States, 323 U.S. 214 (1944).

188. *Hirabayashi*, 320 U.S. at 100.

189. *Id. See also id.* at 111 (Murphy, J., concurring) (referring to the "requirement of due process").

rights of a single racial group are immediately suspect" and subject to the "most rigid scrutiny."[190]

By the late 1940s, the Court ceased to deny that the Fifth Amendment contained a promise of equal protection of the laws.[191] *Bolling* followed easily. In *Brown*, the Court, overruling *Plessy v. Ferguson*, held that "'separate but equal' has no place" and, accordingly, "[s]eparate educational facilities are inherently unequal."[192] The Court so held on the basis of the Equal Protection Clause and found it unnecessary to address claims under the Due Process Clause.[193] Nevertheless, in *Bolling*, which concerned segregation in public schools in the District of Columbia, the Court wrote:

> The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases.

190. *Korematsu,* 323 U.S. at 216. Three justices dissented. Only Justice Murphy referred to the "equal protection of the laws as guaranteed by the Fifth Amendment." *Id.* at 235 (Murphy, J., dissenting). Justice Jackson referred only to the "due process clause." *Id.* at 245 (Jackson, J., dissenting).

In an opinion issued the same day concerning union representation of black firemen under the Railway Labor Act, Justice Murphy referred to the "stigma of unconstitutionality under the Fifth Amendment. . . . The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color." Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 208–09 (1944) (Murphy, J., concurring).

191. *See, e.g.*, United States v. Petrillo, 332 U.S. 1, 8–9 (1947). In Hurd v. Hodge, 334 U.S. 24 (1948), a companion case to Shelley v. Kraemer, 334 U.S. 1 (1948), the Court addressed judicial enforcement of racially restrictive covenants in the District of Columbia. The Court declined to rest its judgment on the Due Process Clause of the Fifth Amendment, preferring to base its judgment on the Civil Rights Act of 1866 and the principle that enforcement was "not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws." *Hurd*, 334 U.S. at 35 (citing a U.S. treaty with China) (footnote omitted).

192. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)).

193. *Id.* The Court dropped a footnote to identify *Bolling*, "concerning the Due Process Clause of the Fifth Amendment." *Id.* at 495 n.12.

> But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[194]

The Court quoted Justice Harlan's dicta from *Gibson v. Mississippi* that the Constitution forbids discrimination on the basis of race "by the General Government, or by the States."[195] Segregated schools were an "arbitrary deprivation" of the students' liberty interests. The only remaining question was whether the less explicit Due Process Clause demanded any less of the federal government in this situation than the Equal Protection Clause demanded of the states in *Brown*, a difference the Court termed "unthinkable."[196]

In what sense was it "unthinkable" that a different result might obtain in *Bolling*? In this context, is "unthinkable" a synonym for "unsustainable" or "unpalatable" or "reprehensible," all of which might have been adjectives for describing federally maintained segregated schools? Or is "unthinkable" a hyperbolic expression for the idea that the Due Process and Equal Protection Clauses overlap to such a degree that it would be unsatisfactory to explain the differences, so the Court would just use the same test? If it was unthinkable that the District of Columbia would maintain segregated schools when the Court had forbidden them everywhere else, why wasn't that a political problem, one that Congress would feel enormous pressure to correct?[197] "Unthinkable" is not the same as "unconstitutional," and the Court's explanation was politically saleable but not very satisfactory as a matter of interpretation, and the Court made no effort to justify its new doctrine.[198]

For a time following *Bolling*, the Court continued to recite that "the Fifth Amendment contains no equal protection clause" and that the standard was whether the discrimination was "so unjustifiable as to be violative of due process."[199] This standard was almost no

194. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

195. *Id.* (quoting Gibson v. Mississippi, 162 U.S. 565, at 591).

196. *Id.* at 500.

197. *See* Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 233–34 (1972) (suggesting that Congress would have been under great pressure to end segregation in the D.C. schools).

198. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1222–23 (2010) ("[I]t is hardly unthinkable—indeed, it is an irrefutable textual fact—that different clauses apply to different government actors.").

199. *See, e.g.*, Schneider v. Rusk, 377 U.S. 163, 168 (1964) (quoting *Bolling*, 347 U.S. at 499).

standard at all; what had made any other result in *Bolling* "unthinkable" was that *Bolling* could be compared with *Brown*.[200] *Bolling*'s equality principle required something to measure against—and there would be no better comparator than a nearly identical case decided under the Equal Protection Clause. Congruence seemed inevitable. In time, the Court began to refer to "the equal protection component of the Due Process Clause"[201] and announced that equal protection was "precisely the same" whether addressed under the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment.[202] Although, as discussed below, the Court has occasionally stated that "the two protections are not always coextensive,"[203] in the main, the Court believes that "the equal protection obligations . . . [are] indistinguishable."[204]

4. Applying Bolling

The prior section tracked the history of reverse incorporation of the Equal Protection Clause, largely without regard to the nature of the right being asserted. This section addresses the contours of the equal protection component of the Due Process Clause with special attention to classifications requiring strict or heightened scrutiny. And this section asks two questions. First, is the rule applicable to the federal government really congruent to the rule applied to the states? That is, is there substantive congruence? As it turns out, in some critical contexts, there is not. Second, where the rules are congruent, did we mask differences between the federal government and the states that matter? In other words, should we

200. *See* Karst, *supra* note 22, at 546 ("[W]hat [the Court] found 'unthinkable' was the political implication of a contrary decision, rather than an anomaly of constitutional principle.").

201. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973).

202. Weinberger v. Weisenfeld, 420 U.S. 636, 638 n.2 (1975). *See also* Karst, *supra* note 22, at 552 (*Bolling* "presented no special considerations of a structural kind that would justify departure from the basic rule of congruence of fifth and fourteenth amendment equal protection").

203. Hampton v. Mow Sung Wong, 426 U.S. 88, 100 (1976). In *Mow Sung Wong*, the Court said that the Equal Protection Clause was "additive" to the Due Process Clause. *Id.* at 100 n.17. *See also* Bearden v. Georgia, 461 U.S. 660, 665 (1983) (observing that in cases concerning indigent defendants, "[d]ue process and equal protection principles converge," but most decisions "have rested on an equal protection framework").

204. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217 (1995). *See* United States v. Windsor, 570 U.S. 744, 769–70 (2013); United States v. Paradise, 480 U.S. 149, 166 n.16 (1987); Buckley v. Valeo, 424 U.S. 1, 93 (1976). *But see* Obergefell v. Hodges, 576 U.S. 644, 672 (2015) (the Equal Protection Clause and Due Process Clauses "set forth independent principles," although they "are connected in a profound way").

have a two-track equal protection principle—are the rules substantively congruent where they should not, or need not, be?

a. Race. Race is the *raison d'etre* for the Fourteenth Amendment and supplied the context for *Bolling* itself. Yet no recognized class receiving any form of heightened scrutiny has been as controversial. On the one hand, we cannot tolerate differences based on race; on the other hand, race is a fact of our culture and must sometimes be taken into account.[205] The debate over the proper course of action played out in the affirmative action cases. There are two possible courses the Court could have taken with respect to affirmative action programs that concern the question of *reverse incorporation*. One path for the Court, whether it approved or disapproved affirmative action programs, would be to hold that both federal and state programs must abide by the same rule; the rules with respect to affirmative action must be substantively congruent. The second path would be to grant the federal government greater leeway than the states to craft race-conscious remedies.[206] The Court clearly opted for the former rule.

Following *Bolling*, it would seem easy to conclude that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[207] The path to congruence, however, was not as straight as we might have anticipated. The question was what to do with affirmative action programs. In a series of fractured decisions, it appeared that a majority of the Court might only review such "benign" or "remedial" programs—whether state or federal—with intermediate scrutiny,[208] while any evidence of

205. *Compare* Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in the judgment and dissenting in part) ("In order to get beyond racism, we must first take account of race."), *with* Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality op. of Roberts, C.J.) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

206. As the cases will bear out, this latter question is complicated by Congress's power under Section 5 of the Fourteenth Amendment. The Court has acknowledged that there may be a difference between federal programs that benefit minorities that derive from Congress's Section 5 authority, *see* Fullilove v. Klutznick, 448 U.S. 448 (1980), and those that rest on some other congressional power, such as the commerce clause, *see* Metro Broadcasting v. FCC, 497 U.S. 547 (1990). *See Adarand Constructors, Inc.*, 515 U.S. at 230–31.

207. *Adarand Constructors Inc.*, 515 U.S. at 227.

208. *See, e.g.*, *Fullilove,* 448 U.S. at 496 (Powell, J., concurring); *id.* at 518–19 (Marshall, J., concurring in the judgment); Regents of the Univ. of Cal., 438 U.S. at 359 (Brennan, J., concurring in the judgment in part and dissenting in part).

invidious discrimination would have to run the gauntlet of strict scrutiny.[209]

In *City of Richmond v. J.A. Croson Co.*,[210] a majority of the Court ruled that Richmond's plan to require city contractors to subcontract at least thirty percent of the contract to minority-owned businesses was subject to strict scrutiny and violated the Equal Protection Clause.[211] But the Court's opinions held out the possibility for a two-track solution: all *state* programs—benign or otherwise—that rested on race would be subject to strict scrutiny, but *Congress* might have greater flexibility in the area of benign discrimination and would be subject to heightened scrutiny only. As Justice Scalia put it, "[a] sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory."[212]

The following Term, in *Metro Broadcasting v. Federal Communications Commission*,[213] the Court upheld two FCC minority-preference policies under intermediate scrutiny. Writing for the majority, Justice Brennan stated that "race conscious classifications adopted by *Congress* to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments."[214] Justice O'Connor, dissenting and citing *Bolling*, protested that "The Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications."[215] Justice O'Connor conceded that Congress might have greater leeway when it exercises its Section 5

209. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273–74 (1986) (plurality op. of Powell, J.), *id.* at 284–85 (O'Connor, J., concurring in part and concurring in the judgment).

210. Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

211. *Id.* at 493–95 (plurality op. of O'Connor, J.); *id.* at 520 (Scalia, J., concurring in the judgment).

212. *See id.* at 522 (Scalia, J., concurring in the judgment).

213. Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990).

214. *Id.* at 565 (emphasis added).

215. *Id.* at 604 (O'Connor, J., dissenting); *see also id.* at 634 (Kennedy, J., dissenting) (citing Bolling v. Sharpe, 347 U.S. 497 (1954)) ("Congress is constrained in its actions by the same standard applicable to the States."). *Cf.* Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (questioning whether Congress can require employers to hire on the basis of race in order to avoid a disparate-impact claim under Title VII; arguing that Congress cannot and citing *Bolling*).

powers, but the FCC's policies "concern[] only the administration of federal programs by federal officials."[216]

Five years later, in *Adarand Constructors, Inc. v. Pena*,[217] the Court overruled *Metro Broadcasting*. Reviewing the history of reverse incorporation, the Court found that a core proposition was "congruence" between the Fifth Amendment Due Process Clause and the Fourteenth Amendment Equal Protection Clause.[218] The Court wrote that in *Metro Broadcasting*, the majority had "repudiated the long-held notion that 'it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government' than it does on a State to afford equal protection of the laws[.]"[219] Thus, there must be "congruence between the standards applicable to federal and state racial classifications[.]"[220] Justice Stevens, dissenting, challenged the majority's "concept of 'congruence'" because it "ignores important practical and legal differences between federal and state or local decisionmakers. . . . A rule of 'congruence' that ignores a purposeful 'incongruity' so fundamental to our system of government is unacceptable."[221]

One curious aspect of the titanic struggle over congruence with respect to race is how little the history of the Fourteenth Amendment played into those decisions. Justice Marshall had referred to the history of the Freedmen's Bureau in his opinion in *Bakke*,[222] but otherwise there was no effort—on either side of the debate over affirmative action—to muscle the history of the amendment.[223] This is surprising because, at the risk of oversimplifying, that history shows that there were a number of

216. *Metro Broad., Inc.*, 497 U.S. at 605–06 (O'Connor, J., dissenting).

217. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

218. *Id.* at 224.

219. *Id.* at 225 (quoting *Bolling*, 347 U.S. at 500).

220. *Id.* at 226. The majority again held open the possibility that Congress might have broader power when acting under Section 5. *Id.* at 230.

221. *Id.* at 249, 255 (Stevens, J., dissenting).

222. *E.g.*, Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 397–98 (1978) (opinion of Marshall, J.). The Freedman's Bureau existed from 1865–72. Among other things, the statute authorized the United States to seize abandoned lands and grant "refugees and freedmen" up to forty acres. An Act to Establish a Bureau for the Relief of Freedmen and Refugees, Pub. L. No. 38-90, 13 Stat. 507 (1865).

223. The Court has not hesitated to recur to the drafting history of the Fourteenth Amendment in other cases. *See, e.g.*, Evenwel v. Abbott, 578 U.S. 54, 64–68, (2016); McDonald v. City of Chicago, 561 U.S. 742, 770–80 (2010); City of Boerne v. Flores, 521 U.S. 507, 520–24 (1997); General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 384–89 (1982).

congressional enactments during the Civil War and Reconstruction in favor of "freedmen," which included both freed slaves and freed Blacks.[224] Eric Schnapper's influential article began out of his work as an advocate in the *Bakke* case[225]—he hoped to persuade the Court that *state* affirmative action programs were valid as a matter of history because the *federal government* had adopted programs such as the Freedmen's Bureau contemporaneous with the adoption of the Fourteenth Amendment.[226] That is, the argument ran that the Equal Protection Clause supplied a congruent rule of decision, and since the federal government had historically adopted race-conscious legislation, the states must be free to do so as well. It was a strong argument in favor of congruence and, in the way the cases presented themselves to the Court, that may have doomed it. Once the Court decided *Croson*, the history could only be used to show why the rule should *not* be congruent—that is, why the federal government should have a freer hand than the states. As a matter of litigation tactics, the argument was advanced in support of congruence and, when that failed, in opposition to congruence. The principle of congruence did not determine winners and losers in the affirmative action debates, only whether one side or the other would win or lose everything.

224. *See* Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 96–113 (2013); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430–31 (1997); Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985). For background on the controversy, see ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–77, at 67–69 (1988).

225. Schnapper, *supra* note 224, at 753 n*.

226. *See generally* Rappaport, *supra* note 224, at 73 ("The best explanation for why the [Fourteenth] Amendment excluded the federal government is that the enactors believed the federal government could be trusted far more than the states. While the Congress likely believed that the federal government should not engage in arbitrary racial discrimination, it allowed this norm to be enforced solely through a principle of political morality."); Siegel, *supra* note 224, at 590 ("[T]here is no plausible originalist argument that the Constitution proscribes the federal government's power to enact benign color-conscious laws, such as affirmative action.").

Ryan Williams has considered the possibility that "the federal government might be permitted to make certain types of race-based distinctions among its citizens that would be unconstitutional if made by the states." In the end, he concludes such a reading "unlikely." Williams, *supra* note 22, at 594. Michael Rappaport came to the same conclusion. Rappaport, *supra* note 224, at 91 ("One possibility is that [the drafters] exempted the federal government from the Fourteenth Amendment because they wanted to allow the federal government to pass class laws and to be able to discriminate based on race. But this possibility seems quite unlikely.").

In the final analysis, *Bolling*'s legacy may have been its impact on federal affirmative action programs. As Richard Primus has shown, *Bolling* has had little direct impact on litigation over invidious discrimination by the federal government, but real impact over affirmative action.[227]

b. Gender, sexual orientation, and family. The day after the Supreme Court decided *Slaughter-House*, it ruled that Illinois could bar Myra Bradwell from practicing law because she was a woman.[228] For almost a century, the Court approved various laws that made distinctions on the basis of sex.[229] Everything changed with *Reed v. Reed*[230] when the Court struck down an Idaho law that preferred men over women as estate administrators. *Reed* was powerful medicine: Chief Justice Burger's opinion held that the law could not even satisfy rational basis scrutiny.[231] Over the next few years, the Court would debate the appropriate standard of review, flirting with strict scrutiny,[232] but ultimately settling on intermediate scrutiny.[233]

The question of whether equal protection would apply to the federal government in matters related to gender, however, was never really in question. Just two years after *Reed*, the Court held that the Due Process Clause of the Fifth Amendment governed

227. Primus, *supra* note 22, at 1037–38. *But see* Adam Winkler, *The Federal Government as a Constitutional Niche in Affirmative Action Cases*, 54 UCLA L. REV. 1931, 1961 (2007) (concluding that federal courts have been more deferential to federal affirmative action programs than state programs).

228. Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873). The Court held that admission to the bar was not a privilege or immunity of national citizenship. *Id.* at 139.

229. *E.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (upholding law allowing women to be eligible for jury service only when they requested it); Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding law forbidding women to serve as a bartender unless she was the wife or daughter of the owner); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (upholding law limiting voting to men). *But see* Adkins v. Children's Hosp., 261 U.S. 525 (1923) (striking down a D.C. law requiring women to be paid a minimum wage as a violation of the liberty of contract).

230. Reed v. Reed, 404 U.S. 71 (1971).

231. *Id.* at 75–76.

232. *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1977) (plurality op. of Brennan, J.).

233. *See* Craig v. Boren, 429 U.S. 190, 197–98 (1976). The current standard seems to require something between intermediate scrutiny and strict scrutiny—"an exceedingly persuasive justification." United States v. Virginia, 518 U.S. 515, 531 (1996).

classifications based on sex.[234] The Court has consistently reaffirmed the principle, and in *Weinberger v. Wiesenfeld* issued perhaps its strongest endorsement of the congruence principle: "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."[235] The closest the Court came to recognizing a separate federal track was in *Rostker v. Goldberg*,[236] concerning whether Congress could require selective service registration of men and not women. The Solicitor General argued that, given Congress's broad, express constitutional authority over the military, the Court should examine the law only for a rational basis. The Court rejected the idea "that the substantive guarantee of due process or certainty in the law will be advanced by any further 'refinement' in the applicable tests . . . ."[237] The case called for the courts "to decide whether Congress, acting under an *explicit constitutional grant of authority*, has by that action transgressed an *explicit guarantee of individual rights* which limits the authority so conferred."[238] For the Court, it was of no moment that the Equal Protection Clause, as such, did not apply to the federal government; the guarantee of "equal protection" was an "explicit guarantee" constraining Congress's exercise of its power over the military. Any deference owed Congress would have to be accounted for in the application of the standard of review.[239]

234. *Frontiero*, 411 U.S. at 680 n.5 (plurality op. of Brennan) (citing Bolling v. Sharpe, 347 U.S. 497 (1954)); *id.* at 691 (Stewart, J., concurring in the judgment) (referring to invidious discrimination); *id.* at 691 (Powell, J., concurring in the judgment) (agreeing that the statute violated the Due Process Clause of the Fifth Amendment).

235. Weinberger v. Weisenfeld, 420 U.S. 636, 638 n.2 (1975); *see also* Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975).

236. Rostker v. Goldberg, 453 U.S. 57 (1981).

237. *Id.* at 69.

238. *Id.* at 70 (emphasis added).

239. *Id.* at 70–71.

The Court has applied a similar test in cases related to sexual orientation,[240] family status,[241] and illegitimacy.[242]

Although in these areas there has been controversy within the Court over the appropriate standard of review and the proper application of that standard, there has been no resistance to the question of congruence. Unlike race, which had a complicated constitutional history suggesting reasons for distinguishing between, for example, federal and state programs to benefit freed slaves and their descendants, questions related to gender, sexual orientation, and family relationships have no federalism component. There is no federalism principle that would suggest that a different rule would apply, for example, for women serving in state national guard units that will see combat as opposed to federal combat troops. Whatever vitality a case like *Rostker v. Goldberg* will have in the future, it is near certain that the Court will apply the same rule to the states and the federal government. In this area, the rule of congruence was easily applied and is broadly recognized.

c. Alienage. Following passage of the Fourteenth Amendment, the Supreme Court readily accepted that aliens were within the class of "persons" protected by the Equal Protection Clause.[243] Prior to the adoption of the Equal Protection Clause, states had long had rules pertaining to aliens, particularly with respect to owning real property.[244] For a period, the Court permitted state restrictions on aliens so long as the states did not interfere with Congress's "authority to control immigration."[245]

240. United States v. Windsor, 570 U.S. 744, 774–75 (2013) (citing Bolling v. Sharpe, 347 U.S. 497 (1954)).

241. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 533 n.5 (1973) (citing *Bolling*, 347 U.S. 497). *See also* Kerry v. Din, 576 U.S. 86, 89–96 (2015) (op. of Scalia, J.) ("Modern equal-protection doctrine casts substantial doubt on the permissibility of such asymmetric treatment of women citizens in the immigration context . . . .").

242. Mathews v. Lucas, 427 U.S. 495, 504–06 (1976); Jimenez v. Weinberger, 417 U.S. 628, 637 (1974) (citing *Bolling*, 347 U.S. 497).

243. Wong Wing v. United States, 163 U.S. 228, 237 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

244. *See* Harrison, *supra* note 152, at 1442; Alfred Avins, *The Civil Rights Act of 1866, the Civil Rights Bill of 1966, and the Right to Buy Property*, 40 S. CAL. L. REV. 274, 277–80 (1967).

245. Truax v. Raich, 239 U.S. 33, 42 (1915). *See also, e.g.*, Clarke v. Deckebach, 274 U.S. 392 (1927); Terrace v. Thompson, 263 U.S. 197 (1923); Patsone v. Pennsylvania, 232 U.S. 138 (1914). *But see* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

That changed with *Graham v. Richardson*,[246] when the Court declared that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."[247] It turns out that "close judicial scrutiny" has mostly meant strict scrutiny;[248] but in other cases, intermediate scrutiny;[249] and rational basis in still other cases.[250] If it seems impossible to apply the congruence principle to such a muddle, it has been. The Court has occasionally paid lip service to the *Graham* principle as applied to the federal government but largely to suggest that *Bolling*'s congruence principle *does not* apply to alienage: "Although both [the Fifth and Fourteenth] Amendments require the same type of analysis . . . the two protections are not always coextensive."[251] Confusingly, in that same case, the Court concluded that the federal Civil Service Commission's rule fell for "precisely the same [reason]" as the "comparable state rules which were invalidated by our decision in *Sugarman* [*v. Dougall*]."[252] And even more confusingly, *the same day* the Court decided another equal protection challenge to a federal rule affecting aliens and, with bare acknowledgment of *Graham*, it declined to engage in any level of scrutiny at all.[253]

It might be possible to weave a consistent story between the state and the federal alienage cases, one that depends on being able to identify legitimate and illegitimate governmental interests in

246. Graham v. Richardson, 403 U.S. 365 (1971).

247. *Id.* at 372.

248. *E.g.*, Bernal v. Fainter, 467 U.S. 216, 219 (1984); Nyquist v. Mauclet, 432 U.S. 1, 7 (1977); *In re* Griffiths, 413 U.S. 717, 721–22 (1973); Sugarman v. Dougall, 413 U.S. 634, 642–43 (1973).

249. *E.g.*, Plyler v. Doe, 457 U.S. 202, 223 (1982).

250. Ambach v. Norwick, 441 U.S. 68, 73–74 (1979); *see also* Cabell v. Chavez-Salido, 454 U.S. 432, 436–41 (1982); Foley v. Connelie, 435 U.S. 291, 295–96 (1978).

251. Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) (citation omitted) (referring to *Graham*, 403 U.S. 365 and *Bolling*, 347 U.S. 497). In Examining Bd. of Eng'rs, Architects, and Surveyors v. Flores de Otero, 426 U.S. 572 (1976), the Court considered a Puerto Rican law limiting civil engineers to U.S. citizens. Without resolving Puerto Rico's constitutional status, the Court concluded that the rule was infirm under either the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment "and the rule of *Bolling v. Sharpe*." *Id.* at 601.

252. *Hampton*, 426 U.S. at 116.

253. Mathews v. Diaz, 426 U.S. 67, 84–87 (1976). *See* Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After* Adarand Constructors, Inc. v. Pena, 76 OR. L. REV. 425 (1997); Brian Souchek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155, 173–86 (2014) (discussing the alienage cases).

discriminating between citizens and aliens. It is easier simply to abandon the effort to find congruence between the federal and state cases, and that is what the Court has done. Accordingly, in *Adarand*, the Court firmly repeated that "the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable," but coyly added, except for "a few contrary suggestions appearing in cases in which we found special deference to the political branches of the Federal Government to be appropriate."[254]

Alienage may be the exception that proves the rule of congruence. It is one thing for courts to disagree over the *application* of, for example, strict scrutiny as a standard of review for a government's acts; it is another thing, entirely unknown to equal protection analysis—especially after *Adarand* overruled *Metro Broadcasting*—to shift the *standard of review* depending on the government's interests. If the Constitution requires strict scrutiny of state restrictions on aliens but only intermediate or rational basis scrutiny for federal restrictions, then perhaps equal protection is the wrong form of analysis. Perhaps the "history [of the Court's treatment of alienage] should make us rethink whether *Graham*'s equal protection analysis alone can explain the Court's cases."[255] Under that analysis, "[t]he equal protection principle announced in *Graham* has proven unsustainable" and "preemption analysis will prove more consistent with the text and structure of the Constitution."[256] In a word, *Graham*'s foray down the equal protection path was a mistake, and the congruence principle helps us understand the error.

d. Fundamental rights. For the most part, the Court has addressed the assertion of other fundamental rights on the assumption that the congruence principle holds, and there is no difference between the standards the Court would apply to federal encroachment of federal rights and state encroachment of such rights. The Court has, for example, engaged in equal

254. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217–18 (citing *Hampton*, 426 U.S. at 100, 101–02 n.21).

255. Korab v. Fink, 797 F.3d 572, 593 (9th Cir. 2014) (Bybee, J., concurring and concurring in the judgment).

256. *Id.* at 598.

protection review of federal claims based on wealth,[257] age,[258] political affiliation,[259] drug status,[260] naturalized citizenship,[261] and residency requirements.[262]

As with classifications based on gender, sexual orientation, or family status, most of these rights cannot be attributed to any particular provision of the Constitution outside of the Equal Protection Clause and do not have a federalism component. One exception might be wealth, which we might loosely connect to the prohibitions on granting a "Title of Nobility." The Nobility Clauses are textually congruent,[263] so they raise no federalism concerns.

C. The Right to Travel

In perhaps the most important passage penned in a circuit court, Justice Bushrod Washington wrote that the Comity Clause's "privileges and immunities" are those "which belong, of right, to the citizens of all free governments."[264] Although such rights were "more tedious than difficult to enumerate," among them was "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise[.]"[265] Some kind of "right to travel" has been broadly recognized ever since. Although justices have questioned its scope and its constitutional source, no justice has disputed its existence.

The right received its first exposition just prior to the adoption of the Fourteenth Amendment in *Crandall v. Nevada*.[266] Nevada taxed all persons who exited the state by stage or railroad. Because Nevada taxed citizens of Nevada and noncitizens alike, the Comity Clause, which had been the source for Justice Washington's dicta, was not grounds for challenging the statute. Nevertheless, without

257. United States v. Kras, 409 U.S. 434, 458 (1973).

258. Vance v. Bradley, 440 U.S. 93, 94–95 n.1 (1979) (citing Bolling v. Sharpe, 347 U.S. 497 (1954)).

259. Buckley v. Valeo, 424 U.S. 1, 93 (1976).

260. Marshall v. United States, 414 U.S. 417, 422 (1974) (citing *Bolling*, 347 U.S. 497).

261. Schneider v. Rusk, 377 U.S. 163, 168 (1964) (citing *Bolling*, 347 U.S. 497).

262. Shapiro v. Thompson, 394 U.S. 618, 641–42 (1969) (citing *Bolling*, 347 U.S. 497). *Shapiro*'s separate consideration of the right of travel is discussed in section II.C.

263. *Compare* U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States;") *with id.* art. I, § 10, cl. 1 ("No State shall . . . grant any Title of Nobility.").

264. Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).

265. *Id.*

266. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868).

resting on any particular constitutional provision, the Court struck down the law. It deferred deciding the case on the basis of the (dormant) Commerce Clause and the Imposts Clause,[267] instead finding that the power of a state to tax persons "passing through a State[,]"[268] would interfere with federal functions.[269] For this proposition, the Court cited a raft of different congressional powers and individual rights, including the immunity of members of Congress attending sessions,[270] Congress's power to declare war and "raise and support armies,"[271] the right to petition the government,[272] and the Ports Preference Clause.[273]

In a subsequent case, *Edwards v. California*,[274] the Court embraced the theory *Crandall* avoided, holding that a California law discouraging indigents from entering the state violated the Commerce Clause.[275] Concurring, Justice Douglas would have held that "[t]he right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities clause of the Fourteenth Amendment[,]" even under the crabbed reading given that provision by *Slaughter-House*.[276] Justice Douglas admitted that the right was "not specifically granted by the Constitution[,]" but given that *Crandall* predated the Fourteenth Amendment, thought it "squarely and authoritatively settled[.]"[277]

267. U.S. CONST. art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imposts or Exports . . . ."). *See Crandall*, 73 U.S. (6 Wall.) at 41–42.

268. *Crandall*, 73 U.S. (6 Wall.) at 41–42.

269. *Id.* at 45 (citing McCulloch v. Maryland, 17 (4 Wheat.) 316 (1819)).

270. U.S. CONST. art. I, § 6, cl. 1 ("[Senators and Representatives] shall in all Cases . . . be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same[.]").

271. *Id.* art. I, § 8, cls. 11–12.

272. *Id.* amend. I.

273. *Id.* art. I, § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another[.]"). *See Crandall*, 73 (6 Wall.) at 43–44. A history of the Court's incorporation of the Ports Preference Clause is discussed in Bybee, *supra* note 20, at 108–10.

274. Edwards v. California, 314 U.S. 160 (1941).

275. *Id.* at 172–74.

276. *Id.* at 178–80 (Douglas, J., concurring) (citing Slaughter-House Cases, 83 (16 Wall.) 36 (1873)). *See also* Twining v. New Jersey, 211 U.S. 78, 97 (1908); Williams v. Fears, 179 U.S. 270, 274 (1900). Justice Jackson wrote separately but agreed that the Privileges or Immunities Clause was a better theory than the Commerce Clause. *Edwards*, 314 U.S. at 182–84 (Jackson, J., concurring).

277. *Edwards*, 314 U.S. at 178–79 (Douglas, J., concurring).

The federal cases came as challenges to foreign travel by U.S. citizens. In the first of these, *Kent v. Dulles*,[278] the Court acknowledged *Crandall* and *Edwards* for the broad principle that "[f]reedom of movement is basic in our scheme of values[,]"[279] but avoided any of the handwringing over the constitutional source of the right. Instead, the Court simply pronounced that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment."[280]

The question of congruence came to a point in *Shapiro v. Thompson*.[281] *Shapiro* involved three cases—from Connecticut, Pennsylvania, and the District of Columbia—in which the jurisdiction had imposed a residency requirement for welfare assistance. With the presence of the District of Columbia in the suit, *Shapiro* was to the right to travel what *Brown* and *Bolling* were to segregated education. With respect to Connecticut and Pennsylvania, the Court disclaimed the "occasion to ascribe the source of this right to travel interstate to a particular constitutional provision."[282] It was sufficient that it was "firmly established and repeatedly recognized."[283] The Court held the state resident requirements unconstitutional.[284] But once the Court reached the District of Columbia, it stated that, for the same reasons, the D.C.

278. Kent v. Dulles, 357 U.S. 116 (1958).

279. *Id.* at 126.

280. *Id.* at 125. *See also* Zemel v. Rusk, 381 U.S. 1, 14 (1965); Aptheker v. Sec'y of State, 378 U.S. 500, 505–06 (1964). In *Aptheker* the Court cited *Bolling*, but only for the proposition that "liberty" cannot be defined "with any great precision," but "extends to the full range of conduct which the individual is free to pursue[.]" *Id.* at 506 n.5 (quoting Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954)).

281. Shapiro v. Thompson, 394 U.S. 618 (1969).

282. *Id.* at 630.

283. *Id.* (quoting United States v. Guest, 383 U.S. 745, 757 (1966)). In *Guest*, the Court observed that "there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel," but "there is no need here to canvass those differences further. All have agreed that the right exists." *Guest*, 383 U.S. at 759 (footnote omitted). *See also* Mem. Hosp. v. Maricopa Cnty., 415 U.S. 250, 254 (1974) ("The right of interstate travel has repeatedly been recognized as a basic constitutional freedom.") (footnote omitted). In *Sosna v. Iowa*, the Court attributed the "right to travel" to "the Court's holdings" in *Shapiro* and other cases. Sosna v. Iowa, 419 U.S. 393, 405 (1975).

284. *Shapiro*, 394 U.S. at 633. The Court's holding blended two principles. It held that the resident requirement "chill[ed] the assertion of constitutional rights" and made "invidious distinctions between classes of its citizens" in violation of the Equal Protection Clause. *Id.* at 631, 633. *See also id.* at 638; *id.* at 657 (Harlan, J., dissenting) (distinguishing between the two grounds).

provision was invalid as a violation of the Due Process Clause of the Fifth Amendment.[285] Justice Harlan, in dissent, took the Court to task for its failure to explain the origins of the right in the federal enclave. He cited five clauses the Court had previously pointed to as the possible source: the Comity Clause of Article IV, the Privileges or Immunities Clause of the Fourteenth Amendment, the Citizenship Clause of the Fourteenth Amendment, the Commerce Clause, and the Due Process Clause of the Fifth Amendment.[286] He dismissed the Comity Clause, the Privileges or Immunities Clause, and the Commerce Clause as the source of the right, as neither of the former clauses bound the federal government, and Congress had plenary power over commerce.[287] He allowed that the Citizenship Clause might protect interstate travel as "a concomitant of federal citizenship[,]" but thought Congress might have power to alter such rights, subject to other constitutional constraints.[288] That left the Due Process Clause, and Harlan was willing to accept that the Court had "settled that freedom to travel is an element of the 'liberty' secured by that clause."[289]

Substantive congruence in the right to *interstate* travel was probably never in doubt.[290] What is unusual about the right to travel is that the Court has failed to explain consistently why states lack power to interfere with interstate travel. Most surprising is that the Court has never entertained the possibility that the right to travel is a "liberty" protected against state interference by the Due Process Clause of the Fourteenth Amendment.[291] Although the "right to travel" is not itself a textual right in the way that "free exercise" or "equal protection" are mentioned in the Constitution, the Court could have reached *substantive and textual* congruence by

285. *Id.* at 642.

286. *Id.* at 666–68 (Harlan, J., dissenting). Justice Harlan had explored these theories previously in *Guest*, 383 U.S. 745. *See id.* at 764–70 (1966) (Harlan, J., concurring in part and dissenting in part). *Guest* involved indictments under 18 U.S.C. § 241 for depriving black citizens of certain constitutional rights, including the right to travel.

287. *Id.* at 666 (Harlan, J., dissenting).

288. *Id.* at 668–69 (Harlan, J., dissenting).

289. *Id.* at 669–70 (Harlan, J., dissenting).

290. The Court has never had occasion to explain what the difference is, if any, between right of interstate travel and a right to travel outside the United States. *See* Kent v. Dulles, 357 U.S. 116, 127 (1958).

291. Justice Harlan noted the possibility in passing. *Shapiro*, 394 U.S. at 669 n.29 (Harlan, J., dissenting).

declaring that the right to travel is protected by *both* the Due Process Clauses of the Fifth and Fourteenth Amendments. The Court has never considered it. One possible explanation for the Court resisting textual congruence is that the right was first recognized in *Crandall*, just before the adoption of the Fourteenth Amendment. This leaves us with an intriguing possibility: if the right to travel has always been within the "liberty" protected by the Fifth Amendment, then *Crandall* is an instance of *incorporation*, but without the benefit of the Fourteenth Amendment. Perhaps congruence transcends text.

The Court had an opportunity to face its lack of coherent explanation in *Saenz v. Roe*.[292] California limited full welfare benefits to those who had resided in the state for a year; those who had lived in California for less than a year were eligible for assistance equal to what they would have received in their previous state of residence. Starting from the premise that the right to travel was "a virtually unconditional personal right,"[293] the Court recognized that it had so held "[w]ithout pausing to identify the specific source of right."[294] Limiting itself to the question of burdens placed on a "newly arrived citizen,"[295] the Court said the right was to be found securely within the Privileges or Immunities Clause.[296]

Saenz attracted attention because it sounded like the Court had breathed new life into the Privileges or Immunities Clause.[297] At the same time, the Court may have added a new wrinkle to reverse incorporation: If it is now clear that the Privileges or Immunities Clause forbids states from burdening new citizens with residency requirements, does the same rule apply to Congress and the District of Columbia? If so, is the Privileges or Immunities Clause reverse incorporated against the federal government through the Due

292. Saenz v. Roe, 526 U.S. 489 (1999).

293. *Id.* at 498 (quoting *Shapiro*, 383 U.S. at 643 (Stewart, J., concurring)).

294. *Id.* at 499.

295. *Id.* at 502.

296. *Id.* at 502–04.

297. *See id.* at 521, 528 (Thomas, J., dissenting) (disagreeing with the majority on the merits, but expressing a willingness to consider "reevaluating [the Privileges or Immunities Clause's] meaning"). *See also* Laurence H. Tribe, Comment, Saenz *Sans Prophecy: Does the Privileges or Immunity Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999).

Process Clause?[298] If not, but Congress is barred by the Due Process Clause, then why didn't the Court square everything up in *Saenz* by relying on the Due Process Clause of the Fourteenth Amendment?[299] What if *Saenz* had involved at least one plaintiff who was an alien, who, as a noncitizen, cannot claim the protection of the Privileges or Immunities Clause? The right to travel, enforceable against the federal government and the states, may be substantively congruent, but it is a textual mess.

D. Sovereign Immunity

Article III of the Constitution extended the judicial power of the United States to "Controversies between two or more States;—between a State and Citizens of another State; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[300] The federal courts might have jurisdiction to entertain such controversies, but did the states enjoy sovereign immunity? The Court answered quickly in *Chisolm v. Georgia*: The states were subject to suit in federal court.[301] The following day an amendment was introduced in the House of Representatives. By 1798, we had our first amendment outside of the Bill of Rights. The Eleventh Amendment overruled the rule in *Chisolm* in no uncertain terms.[302]

298. *But see* Maehr v. U.S. Dep't of State, 5 F.4th 1100, 1107–08 (10th Cir. 2021) (holding that the Privileges or Immunities Clause is not reverse incorporated against the federal government; the right to travel protected by the Privileges or Immunities Clause is "interpreted to mean *interstate* travel, never *international* travel"); Metro. Wash. Chap., Assoc. Builders & Contractors, Inc. v. District of Columbia, 578 F. Supp. 3d 7, (D.D.C. 2021), *appeal docketed*, No. 22-7014 (D.C. Cir. Jan. 31, 2022).

299. One alternative would be for the Court to find the right to travel within the Citizenship Clause of the Fourteenth Amendment. That provision is declaratory and applies to the federal government as well as the states. *See Saenz*, 526 U.S. at 507–08 ("[T]he protection afforded to the citizen by the Citizenship Clause of [the Fourteenth] Amendment is a limitation on the powers of the National Government as well as the States."). That conclusion would be consistent with arguments by Justices Harlan, Shapiro v. Thompson, 394 U.S. 618, 668 (Harlan, J., dissenting); Douglas, Edwards v. California, 314 U.S. 160, 178–80 (Douglas, J., concurring); Jackson, *id.* at 182–83 (Jackson, J., concurring); Field, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 98 (Field, J., dissenting); and Bradley, *id.* at 114 (Bradley, J., dissenting).

300. U.S. CONST. art. III, § 2. The Supreme Court had original jurisdiction over "all Cases . . . in which a State shall be Party." *Id.*

301. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). The justices wrote *seriatim*. *Id.* at 429. Only Justice Iredell thought the states immune from suit in federal court. *Id.* at 429–30.

302. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens

Chisolm had addressed the question of *state* sovereign immunity, or at least immunity in federal proceedings, but what about *federal* sovereign immunity? The same section of Article III at issue in *Chisolm* extended the judicial power to "Controversies to which the United States shall be a Party."[303] What rule governed the United States?[304] The answer came, surprisingly, in dicta in *Cohens v. Virginia*.[305] The question was whether a lottery established by Congress in the District of Columbia authorized the sale of tickets in Virginia, which otherwise prohibited lottery sales. In the course of discussing the Court's jurisdiction over Virginia, the Court referred to the Eleventh Amendment. In the same discussion, Chief Justice Marshall mentioned, without reference, that "[t]he universally received opinion is, that no suit can be commenced or prosecuted against the United States" without its consent and "the judiciary act does not authorize such suits."[306] Such a view may have been "universally received," but the Supreme Court itself saw no such immunity with respect to the states, and the Congress and the states had moved quickly to confer immunity in the Eleventh Amendment. So why did the federal government have sovereign immunity under the Constitution if the states did not? Marshall's dictum was neither explained nor questioned.[307]

The general rule—that the sovereign cannot be sued without its consent—rolls easily off the tongue, but in practice, sovereign immunity is complex.[308] For our purposes, however, it is sufficient to observe that the rules applicable to the states and the federal

of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Eleventh Amendment did not, by its terms, cover suits in federal court by citizens against their *own* states. The Court held that the Eleventh Amendment extended to such suits in *Hans v. Louisiana*, 134 U.S. 1 (1890).

303. U.S. CONST. art. III, § 2.

304. Two of the justices that made up the majority suggested that the United States might be immune, even if the states were not. *Chisolm*, 2 U.S. (2 Dall.) at 469 (opinion of Cushing, J.); *id.* at 478 (opinion of Jay, C.J.).

305. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

306. *Id.* at 411–12.

307. *See, e.g.*, Williams v. United States, 289 U.S. 553, 574 (1933) (quoting *Cohens*); United States v. Lee, 106 U.S. 196, 226–27 (1882) (quoting *Cohens*); United States v. McLemore, 45 U.S. (4 How.) 286, 287–88 (1846); United States v. Clarke, 33 U.S. (8 Pet.) 436, 443 (1834).

308. *See generally* Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439 (2005).

government are largely congruent[309] and that the federal rule was "influenced by the Eleventh Amendment cases."[310] As Justice Stevens wrote, "under our cases it is the doctrine of sovereign immunity, rather than the text of the Amendment itself, which is critical to the analysis of any Eleventh Amendment problem."[311] The Eleventh Amendment became the excuse for sovereign immunity, state and federal. As Vicki Jackson has summarized:

> The early influence of *Chisolm* and its overruling by the Eleventh Amendment may explain the failure to develop a more reasoned account of the source of federal sovereign immunity in the several nineteenth century cases that refer to it in passing. Notwithstanding differences between the two levels of government, the idea that no sovereign government can be sued without its consent has been invoked to support both federal and state sovereign immunity. Little distinction has been drawn between the immunities afforded to the two levels of government and the caselaw has borrowed one from the other—to the detriment of clear explication of the source or nature of this immunity.[312]

It may well be that the Court has long had buyer's remorse over *Chisolm*, but it surely had some obligation to explain state and federal sovereign immunity, whatever its source. In the current state of affairs, the general rule is substantively congruent, but the origins are textually discordant. The result is that two hundred and twenty-odd years after we adopted the Eleventh Amendment, the Court is still engaged in fierce debates over the origins of sovereign immunity.[313]

309. *See* Stanley v. Schwalby, 147 U.S. 508, 518 (1893) ("[I]t may be accepted as unquestioned that neither the United States nor a state can be sued as defendant in any court in [t]his country without their consent, except in the limited class of cases in which a state may be made a party in this court by virtue of the original jurisdiction conferred by the constitution."). *See also* Belknap v. Schild, 161 U.S. 10, 18–19 (1896) (applying principles from state cases to the federal government).

310. Antonin Scalia, *Historical Anomalies in Administrative Law*, 1985 Y.B. 103, 105.

311. Pennhurst State Sch. v. Halderman, 465 U.S. 89, 141–42 (1984) (Stevens, J., dissenting).

312. Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 540–41 (2003) (footnotes omitted). *See id.* at 541 n.84 ("The casual assumption that the immunities are the same is all the more surprising because of some significant differences in how they operate"; listing differences).

313. In Alden v. Maine, 527 U.S. 706 (1999), a 5-4 decision, the majority did everything but overrule *Chisolm* and declare the Eleventh Amendment unnecessary. *See id.* at 713 ("[S]overeign immunity of the States neither derives from, nor is limited by, the terms of the

E. Constitutional Remedies

As the United States struggled with reconstruction, "the Ku Klux Klan's campaign of terror overcame Republicans' growing reluctance to intervene in Southern affairs."[314] Over a five-year period, Congress adopted a series of civil rights enforcement acts.[315] Section 1 of the Civil Rights Act of 1871, also known as the Ku Klux Act, provided a damage remedy for violation of constitutional rights under color of law. The current version, codified at 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[316]

In the early cases, the Court held that the Fourteenth Amendment barred state action, not private action, and that constraint limited Congress's power under Section 5 as well.[317]

In 1961, in *Monroe v. Pape*,[318] the Court breathed new life into § 1983. The question was whether the "under color of [law]" provision required proof that a state official violating constitutional rights was acting in accordance with state law, or whether it was

Eleventh Amendment."). *See also* Franchise Tax Bd. of Calif. v. Hyatt, 139 S. Ct. 1485, 1496 (2019) (referring to *Chisolm* as "the Court's blunder"); Hans v. Louisiana, 134 U.S. 1, 18–19 (1890) (observing that, given the swiftness with which the Eleventh Amendment was adopted, "we think we are at liberty to prefer Justice Iredell's views in this regard").

314. FONER, *supra* note 223, at 454.

315. *E.g.*, Civil Rights Act of 1875, Act of March 1, 1875, ch. 114, 18 Stat. 335 (making it a misdemeanor to deny equal enjoyment of public accommodations); Civil Rights Act of 1871, Act of April 20, 1871, ch. 22, 17 Stat. 13 (creating a tort remedy for constitutional violations) (codified, as amended, at 42 U.S.C. § 1983); Civil Rights Act of 1870, ch. 22, 17 Stat. 140 (making it a misdemeanor to interfere with the right to vote) (codified, as amended, at 42 U.S.C. §§ 1971, 1981, 1987–91). Background on the various acts may be found in Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 396–400 (1982), and Note, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1141–56 (1977).

316. 42 U.S.C. § 1983.

317. *E.g.*, Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1883); United States v. Cruikshank, 92 U.S. 542 (1876).

318. Monroe v. Pape, 365 U.S. 167 (1961), *overruled in part by* Monell v. Dep't Soc. Servs. N.Y.C., 436 U.S. 658 (1978).

sufficient that he was acting under the apparent authority of the state. The Court chose the latter, more generous reading.[319] Section 1983 broadened the remedies available for state constitutional violations. But *Monroe* also came in an era when the Court was extending the reach of the Constitution to the states through the doctrine of incorporation.[320]

Section 1983 was a statutory remedy provided by Congress to enforce the Fourteenth Amendment. By its terms, § 1983 did not apply to federal officials. Although the Court had long recognized that persons could maintain a private action in *common law* tort against U.S. officers acting under color of federal law,[321] there was no comparable statute creating a tort remedy against federal officials for violation of *constitutional* rights.[322] That changed just ten years after *Monroe* in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[323] The Court read a remedy for "money damages" into the Fourth Amendment.[324] The Court offered little explanation for its power to create such a remedy beyond the principle that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[325] In fact, the Court could not point to any "federal statute provid[ing] for a general right to sue,"[326] but Justice Harlan, concurring, pointed to 28 U.S.C. § 1331, granting the federal courts general federal question jurisdiction, as the statutory source.[327]

319. *Monroe*, 365 U.S. at 183–84; *see also id.* at 194 (Harlan, J., concurring).

320. *See* McDonald v. City of Chicago, 561 U.S. 742, 759–66 (2010) (recounting the history).

321. The Supreme Court had previously recognized "an action of tort by a private person whose rights of property [U.S. officers and agents] have wrongfully invaded or injured, even by authority of the United States." Belknap v. Schild, 161 U.S. 10, 18 (1896). *See, e.g.*, Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1851); Little v. Barreme, 6 U.S. (2 Cranch) 170, 178 (1804). *See also* Stephen I. Vladeck, *The Disingenuous Demise and Death of* Bivens, 2020 CATO S. CT. REV. 263, 267–70 ("[T]here was no question as to whether federal courts had the power to provide judge-made damages remedies against individual federal officers.").

322. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1854 (2017). The Court had held that § 1983 did not apply to the District of Columbia or its officers, who were federal, not state, employees. District of Columbia v. Carter, 409 U.S. 418, 424 (1973).

323. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

324. *Id.* at 397.

325. *Id.* at 396 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

326. *Id.*

327. *Id.* at 405 (Harlan, J., concurring in the judgment).

Justice Harlan wrote that "federal courts are [not] powerless to grant damages in the absence of explicit congressional action authorizing the remedy."[328] In the absence of a remedy supplied by Congress, "for people in Bivens' shoes, it is damages or nothing."[329]

There was still the question of what official immunity federal officials would enjoy. In *Butz v. Economou*,[330] the Court found "the immunity of state officers when sued under 42 U.S.C. § 1983 . . . instructive,"[331] because any other decision "would be 'incongruous and confusing, to say the least.'"[332] The Court left open the possibility that Congress could issue "directions to the contrary," but in the absence of legislation, it was "untenable to draw a distinction" between state officials and federal officials just as it was untenable to have "one law for Athens and another for Rome"[333]: "To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head."[334] Justice Rehnquist, dissenting in part, objected to the Rome/Athens analogy: "Homilies cannot replace analysis in this difficult area . . . . And even a moment's reflection on the nature of the *Bivens*-type action and the purposes of § 1983 . . . supplies a compelling reason for distinguishing between the two different situations."[335] He criticized the majority for equating § 1983 with general federal question jurisdiction. The "suggestion evinces a basic misunderstanding of the difference between a statute which vests jurisdiction in federal courts . . . and a statute . . . which creates a private right of action."[336] The conclusion—"that there

328. *Id.* at 403.

329. *Id.* at 409–10.

330. Butz v. Economou, 438 U.S. 478, 496 (1978).

331. *Id.* at 496. *See also id.* at 500, 502 n.30 ("[T]he absence of a statute similar to § 1983 pertaining to federal officials cannot be the basis for an inference about the level of immunity appropriate to federal officials.").

332. *Id.* at 499 (quoting Economou v. U.S. Dep't. of Agric., 535 F.2d 688, 695 n.7 (2d Cir. 1976)). The Court also noted "the 'incongruity' that would arise if officials of the District of Columbia, who are not subject to § 1983, were given absolute immunity while their counterparts in state government received qualified immunity." *Id.* at 499 n.26.

333. *Id.* at 504, 499 n.25 (quoting Anderson v. Nosser, 438 F.2d 183, 205 (5th Cir. 1971) (Bell, J., concurring specially in the judgment)).

334. *Id.* at 504.

335. *Id.* at 525 (Rehnquist, J., concurring in part and dissenting in part). *See also* Carlson v. Green, 446 U.S. 14, 43–44 (1980) (Rehnquist, J., dissenting).

336. *Butz*, 438 U.S. at 526 (Rehnquist, J., concurring part and dissenting in part).

should be no difference in immunity between state and federal officials—remains subject to serious doubt."[337]

Bivens left open a number of questions that might have implications for its relationship with § 1983. First, what was the Court's authority for creating the remedy? In subsequent cases, the Court confirmed that "[o]ur authority to imply a new constitutional tort, not expressly authorized by statute, is anchored in our general jurisdiction to decide all cases 'arising under the Constitution, laws, or treaties of the United States.'"[338] Second, was the Court creating a remedy that could be displaced by congressional legislation, or was a *Bivens* remedy mandated by the Constitution? If it is the latter, does that mean that § 1983 was unnecessary? The Court has declined to answer the question directly,[339] but it has deferred creating "a freestanding [federal] remedy in damages" where there is "any alternative, existing process for protecting the interest."[340] Third, did a *Bivens* suit apply to any violation of the Constitution, as does § 1983? *Bivens* itself was limited to Fourth Amendment violations.

More recently, the Court has fiercely resisted expanding *Bivens* relief beyond the Fourth Amendment; the Fifth Amendment Due Process Clause, including its "equal protection component;"[341] and the Eighth Amendment.[342] Although those three amendments

337. *Id.*

338. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001) (quoting 28 U.S.C. § 1331). *See also* Crawford-El v. Britton, 93 F.3d 813, 829–32 (D.C. Cir. 1996) (Silberman, J., concurring) (providing additional history on the relationship between 42 U.S.C. § 1983 and 28 U.S.C. § 1331). *But see* Vladeck, *supra* note 320, at 277 ("[F]ederal courts, from the Founding and well into the 20th century, routinely recognized and/or fashioned judge-made damages remedies against federal officers in appropriate cases.").

339. Bush v. Lucas, 462 U.S. 367, 378 n.14 (1983).

340. Wilkie v. Robbins, 551 U.S. 537, 550 (2007). The Court has respected such state-created alternatives as well. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527 (1981), *overruled in part on other grounds*, Daniels v. Williams, 474 U.S. 327 (1986). It has stated that "[s]tate-law remedies and a potential *Bivens* remedy need not be perfectly congruent." Minneci v. Pollard, 565 U.S. 118, 129 (2012).

341. Davis v. Passman, 442 U.S. 228, 243–44 (1979) (citing Bolling v. Sharpe, 347 U.S. 497 (1954)).

342. Carlson v. Green, 446 U.S. 14 (1980). *See* Hernandez v. Mesa, 140 S. Ct. 735, 742–43 (2020); Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (citing cases in which the Court declined to create an implied damages remedy); *Malesko*, 534 U.S. at 68–69 (citing cases refusing to extend *Bivens* liability to any new context). Erwin Chemerinsky has catalogued early lower court decisions recognizing *Bivens* suits for violations of the First, Ninth, and Fourteenth Amendments. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 611 (5th ed. 2007).

encompass the bulk of constitutional tort litigation, last Term, the Court strongly suggested that *Bivens* was wrongly decided and will likely not be extended.[343] For now, *Bivens* is congruent to § 1983 in those cases to which *Bivens* applies.[344] Nevertheless, some members of the Court have called for the lockstep expansion of what the Court has referred to as "the federal analog to suits brought against state officials under [§ 1983]."[345] Justice Stevens, writing in *Correctional Services Corp. v. Malesko* for himself and Justices Souter, Ginsburg, and Breyer, acknowledged that "we have never expressly held that the contours of *Bivens* and § 1983 are identical. The Court, however, has recognized sound jurisprudential reasons for parallelism, as different standards for claims against state and federal actors 'would be incongruous and confusing.'"[346] Quoting *Bolling*, Justice Stevens wrote that "it would be unthinkable that the same Court would impose a lesser duty on the Federal Government."[347]

F. Other Rights That Might Be Reverse Incorporated

What other rights, privileges, or immunities might be candidates for reverse incorporation? The list is going to be short because many of the remaining limitations on the states cannot feasibly be applied to the United States. For example, some provisions in Article I,

343. Egbert v. Boule, 142 S. Ct. 1793, 1809 (2022) ("[I]f we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution. But, to decide the case before us, we need not reconsider *Bivens* itself.") *See also id.* at 1809–10 (Gorsuch, J., concurring in the judgment) (calling *Bivens* a "misstep" and advocating that the Court "take the next step and acknowledge explicitly what the Court leaves barely implicit").

344. The Court has thus far denied that "*Bivens* extends to First Amendment claims." Reichle v. Howards, 566 U.S. 658, 663 n.4 (2012). *See Bush*, 462 U.S. at 388–90. But in several cases it was willing to assume, without deciding, that there was a *Bivens* remedy for First Amendment violations. Wood v. Moss, 572 U.S. 744, 757 (2014); Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009); Hartman v. Moore, 547 U.S. 250, 256 (2006).

345. *Hartman*, 547 U.S. at 254 n.2. *See also Hernandez*, 140 S. Ct. at 747 (declining to extend *Bivens* to noncitizens outside the United States when "Congress chose to make § 1983 available only to 'citizen[s] of the United States or other person[s] within the jurisdiction thereof'"). For a good discussion of the status of the relationship between *Bivens* and § 1983, see James E. Pfander & David Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117 (2009).

346. *Malesko*, 534 U.S. at 82 (Stevens, J., dissenting) (quoting Butz v. Economou, 438 U.S. 478, 499 (1978)).

347. *Id.* (quoting Bolling v. Sharpe, 347 U.S. 497, 500 (1954)).

Section 10 refer to Congress[348] or may be cross-referenced to a power granted elsewhere to Congress or the President;[349] the combination of granting power to the United States and disabling the states with respect to the same subject matter guarantees that the United States will have exclusive power. Although the list is short, there are some restrictions on the states that could feasibly be reverse incorporated. This section will discuss four: The Privileges or Immunities Clause, the Due Process Clause, the Full Faith and Credit Clause, and the Guarantee Clause.

1. The Privileges or Immunities Clause

The demise of the Privileges or Immunities Clause in the *Slaughter-House Cases*[350] is a theme that runs through both the incorporation of the Bill of Rights[351] and the reverse incorporation of the Equal Protection Clause.[352] The confusion coming out of the *Slaughter-House Cases* had its origins in the drafting of Section 1 of the Fourteenth Amendment. Thaddeus Stevens introduced a redrafted amendment in April 1866. He explained that the Privileges or Immunities, Due Process, and Equal Protection Clauses were "all asserted, in some form or other, in our DECLARATION or organic law."[353] The reference to "privileges or immunities" was an obvious reference to the phrase "Privileges and Immunities" in the Comity Clause in Article IV.[354] Members of Congress quickly tied the phrase to Justice Washington's

348. *E.g.*, U.S. CONST. art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . . ."); *id.* art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace . . . .").

349. *E.g.*, *compare id.* art. I, § 10, cl. 1 ("No State shall enter into any Treaty . . . ."), *with id.* art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . ."); *compare id.* art. I, § 10, cl. 1 ("No State shall . . . grant Letters of Marque and Reprisal . . . .") *with id.* art. I, § 8, cl. 11 ("[The Congress shall have Power] To . . . grant Letters of Marque and Reprisal . . . ."); *compare id.* art. I, § 10, cl. 1 ("[No State shall] coin Money . . . .") *with id.* art. I, § 8, cl. 5 ("[The Congress shall have the Power] To coin Money . . . .").

350. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

351. *See* Bybee, *supra* note 20, at 77–78, 118.

352. *See supra* Section II.B.2.

353. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

354. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

exposition in *Corfield v. Coryell*,[355] but no one was clear what it prohibited. Senator Jacob Howard, a strong proponent of the proposed amendment, referred to "these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature."[356] Senator Reverdy Johnson, an experienced Supreme Court practitioner and the only Democratic Senator on the Joint Committee tasked with drafting the amendment, spoke in favor of the due process and equal protection clauses but thought the privileges or immunities provision was "quite objectionable" because he "[did] not understand what [would] be the effect of [the provision]."[357] Others expressed confusion over the provision as well.[358]

Whatever confusion the framers of the Fourteenth Amendment had over the scope of the Privileges or Immunities Clause was largely mooted by the Court's decision in the *Slaughter-House Cases*. The Court read the provision to forbid state interference with the privileges and immunities of *federal*, not *state*, citizenship.[359] It then proceeded to list several federal rights that the states could not infringe, including the right to travel, to demand the protection of the United States on the high seas and while in foreign lands, to assemble and petition the government, and to seek a writ of habeas corpus.[360] As Justice Field pointed out in dissent, under the Supremacy Clause, the states could not have interfered with those federal rights *before* the adoption of the Fourteenth Amendment.[361]

The Privileges or Immunities Clause has received a great deal of renewed attention, both in the courts and in the academy. This is not the place to review those discussions, because our focus here is whether a rehabilitated Privileges or Immunities Clause might be

355. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

356. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

357. *Id.* at 3041.

358. *See id.* at 3039 (statement of Sen. Hendricks) ("I have not heard any Senator accurately define, what are the rights and immunities of citizenship; and I do not know that any statesman has very accurately defined them."); *see also id.* at app. 135 (statement of Rep. Rogers). For discussion of the debates over how a privileges or immunities provision could be enforced and who would have the power to enforce it, see Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1592–96 (1995).

359. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 75 (1873).

360. *Id.* at 79–80. *See* Twining v. New Jersey, 211 U.S. 78, 97–99 (1908).

361. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting).

reverse incorporated against the United States. But the answer to our question depends on what we pour into the Clause. Much of the current attention has focused on the Privileges or Immunities Clause as the proper vehicle for incorporation of the Bill of Rights, a proposal that would bring a great deal more coherence to the doctrine of incorporation, but would have few implications for reverse incorporation.[362] Others argue that the Privileges or Immunities Clause is an intrastate equality provision and the mechanism for forbidding Jim Crow laws.[363] Still, others believe that the Privileges or Immunities Clause guarantees certain substantive rights, including rights outside those enumerated in the Bill of Rights.[364]

We have previously analyzed the one privilege or immunity of citizenship that everyone seems to agree on—the right to travel—and have explained the Court's convoluted path to concluding that the right is held against both the states and the federal government.[365] Thus far, lower courts have declined to expand the scope of the Privileges or Immunities Clause through reverse incorporation.[366] Nevertheless, there is some movement in academia to promote a more robust Privileges and Immunities Clause and then apply it to the federal government along the lines of *Bolling v. Sharpe*.[367] If the Court were to reinvigorate a substantive reading of the Privileges or Immunities Clause, the congruence principle might tempt the Court to reverse incorporate those rights against the United States.

362. *See* McDonald v. City of Chicago, 561 U.S. 742, 806, 838, 858 (2010) (Thomas, J., concurring in part and concurring in the judgment); Ramos v. Louisiana, 140 S. Ct. 1390, 1423 (2020) (Thomas, J., concurring); Timbs v. Indiana, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring); *id.* (Thomas, J., concurring in the judgment); AMAR, *supra* note 169, at 215–30; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

363. *See* Harrison, *supra* note 152.

364. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1319 (3d ed. 2000); Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U.L.Q. 405, 418–19.

365. *See supra* Section II.C.

366. Maehr v. U.S. Dep't of State, 5 F.4th 1100, 1107–08 (10th Cir. 2021); Adams v. Clinton, 90 F. Supp. 2d 35, 68, 68 n.66 (D.D.C. 2000) (per curiam) (three-judge district court).

367. *See, e.g.*, Tribe, *supra* note 297, at 193 n.353; Kurland, *supra* note 363, at 415, 419–20; Derek Shaffer, Note, *Answering Justice Thomas in* Saenz*: Granting the Privileges or Immunities Clause Full Citizenship Within the Fourteenth Amendment*, 52 STAN. L. REV. 709, 735 n.124 (2000).

2. The Due Process Clause

On its face, it seems exceedingly strange to consider whether the Due Process Clause of the Fourteenth Amendment—the mechanism for incorporation of the Bill of Rights—might be applied to the federal government through reverse incorporation. The theory of reverse incorporation generally addresses the situation where the Court believes a right held against the states should also apply against the federal government. In general, as we have seen, reverse incorporated rights are substantively congruent but textually discordant. We can be forgiven if we have long assumed that textually congruent provisions of the Constitution—such as the Bill of Attainder, Ex Post Facto, and Nobility Clauses—are substantively congruent as well. But those clauses were all adopted contemporaneously in 1791.

Are we confident that the Due Process Clause of the Fourteenth Amendment, adopted in 1868, is congruent to the Due Process Clause of the Fifth Amendment, adopted in 1791? Justice Frankfurter was. As he bluntly put it, "[t]o suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection."[368] Justice Scalia, however, writing for a plurality of the Court, declared that the "crucial time" for understanding the Fourteenth Amendment was "1868, when the Fourteenth Amendment was adopted."[369] And before either Frankfurter or Scalia joined the Court, it observed that "[w]hile the language of those amendments is the same, yet, as they were ingrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper."[370] As a result, the Court warned, "a

368. Malinski v. New York, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring).

369. Burnham v. Superior Ct. of Cal. 495 U.S. 604, 611 (1990) (plurality op. of Scalia, J.). *See also* McIntyre v. Ohio Elec. Comm'n, 514 U.S. 334, 372–73 (1995) (Scalia, J., dissenting) (discussing election practices in 1791 and 1868).

370. French v. Barber Asphalt Paving Co., 181 U.S. 324, 328 (1901). The Court, however, was willing to assume that "the legal import of the phrase 'due process of law' is the same in both amendments." *Id.* at 329; *see also id.* (stating that the Fourteenth Amendment was "[not] intended to impose on the states . . . any more rigid or stricter curb than that imposed on the Federal government . . . by the Fifth Amendment"). *See also* Carroll v. Greenwich Ins.

long and consistent construction put upon the 5th Amendment" will not necessarily "be deemed overruled by a decision concerning the operation of the 14th Amendment."[371]

More recent scholarship about the original meaning of the Clauses concludes that "the meaning of 'Due Process of Law' might have changed between 1791 and 1868" and that there is a "possibility of divergence" between the two clauses.[372] Ryan Williams has taken the more aggressive position that there is a difference between the two clauses and that "one, and only one, of the two Clauses—the Fourteenth Amendment Due Process Clause—encompassed a recognizable form of substantive due process."[373]

If, notwithstanding their textual congruence, the Due Process Clauses are substantively discordant, that creates the possibility that if the Court finds substantive rights within the Due Process Clause of the Fourteenth Amendment, it will then reverse incorporate such rights through the Due Process Clause of the Fifth

Co., 199 U.S. 401, 410 (1905) ("While we need not affirm that in no instance could a distinction be taken, ordinarily if an act of Congress is valid under the 5th Amendment it would be hard to say that a state law in like terms was void under the 14th."); Tonawanda v. Lyon, 181 U.S. 389, 391 (1901) (similar).

371. Wight v. Davidson, 181 U.S. 371, 384 (1901). *Wight* concerned a District of Columbia property owner's challenge to a special assessment. Justice Harlan, in dissent, contested any suggestion that "what a state might not do . . . without due process of law, Congress . . . could." *Id.* at 386–87 (Harlan, J., dissenting). For Harlan, the "words 'due process of law' mean the same in both Amendments"; any other reading would be "most mischievous in its tendency." *Id.* at 387. *See also French*, 181 U.S. at 355 (Harlan, J., dissenting). For additional history, see Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle"*, 90 MINN. L. REV. 826, 855–59 (2006).

372. Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 VA. L. REV. 447, 450, 527–28 (2022); *see also* Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1441 (2022) (proposing "[r]econceptualizing the doctrine of incorporation as involving a respeaking of the Bill of Rights" as of 1868). The Court itself acknowledged the issue in *New York State Rifle & Pistol Ass'n v. Bruen*, but concluded that it would not address the issue because "the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry." 142 S. Ct. 2111, 2137–38 (2022); *see also id.* at 2163 (Barrett, J., concurring).

373. Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 415 (2010). Professor Williams writes that "by 1868 'due process of law' had developed additional, well-established substantive connotations as both a prohibition of legislative interference with vested rights and as a guarantee of general and impartial laws." *Id.* at 416. *See also* Harrison, *supra* note 61, at 553–54. *But see* Gedicks, *supra* note 57, at 592–93 (arguing that an originalist reading of the Due Process Clause of the Fifth Amendment would include substantive due process; assuming the two Due Process Clauses mean the same).

Amendment to satisfy the congruence principle.[374] It might be difficult to detect such a move by the courts. It is simply easier for the Court to declare the two Clauses substantively congruent and adopt the most rights-generous reading of either Clause as the baseline, but it is also not at all difficult to imagine the Court looking to rights accepted as of 1868 and embodied in the Fourteenth Amendment and then reading such back into the Fifth Amendment. Such a move is well within the tradition of *Bolling*.

3. The Full Faith and Credit Clause

The Full Faith and Credit Clause[375] presents an intriguing possibility for reverse incorporation, although 28 U.S.C. § 1738 makes it unlikely the Court will have to reach it. The argument for reverse incorporation is not difficult to make and runs through *Pennoyer v. Neff*.[376] The first sentence of the Clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The term "faith and credit," which was also found in the Articles of Confederation,[377] was an English rule of evidence to admit into evidence the judgment from a foreign jurisdiction,[378] under which the foreign judgment was not necessarily accorded *res judicata* status but "generally only the status of *prima facie* evidence in support thereof, so that the merits of the original controversy should always be opened."[379] Full faith and credit was a rule of comity derived from private international law and closely related to choice of law and personal jurisdiction.[380] The second

374. *See* Crema & Solum, *supra* note 372, at 529; Williams, *supra* note 373, at 503–05. The authors of both of these articles advocate reading the two clauses independent of each other. Crema & Solum, *supra* note 372, at 529; Williams, *supra* note 373, at 505–06.

375. U.S. CONST. art. IV, § 1.

376. Pennoyer v. Neff, 95 U.S. 714 (1877).

377. ART. OF CONFED. art. IV, cl. 3.

378. *See generally* Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499 (1980); *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735 (1981).

379. THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION, S. Doc. No. 99-16, at 835–36 (1987).

380. *See* D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 175–76 (1851). *See also* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 295–310 (1992).

sentence in the Clause was new to the Constitution. It granted Congress the power to "by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

In 1790, Congress implemented the Full Faith and Credit Clause, providing that "said records and judicial proceedings . . . shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken."[381] In *Mills v. Duryee*,[382] the Court clarified that the implementing act prescribed not only a rule of evidence but choice of law as well: "If in [the foreign] court it has the faith and credit of evidence of the highest nature . . . it must have the same faith and credit in every other court."[383] If the judgment "was conclusive upon the parties in that state, [i]t must, therefore, be conclusive here also."[384] The Court also observed that the implementing act did not just apply to state courts, but to "every court within the United States."[385]

Although federal courts are bound by the implementing act, the United States is not formally bound by the Full Faith and Credit Clause and may determine for itself the effect it will afford judgments from other courts.[386] That means that Congress or the

381. Act of May 26, 1790, ch. 11, 1 Stat. 122 (current version, as amended, is 28 U.S.C. § 1738).

382. Mills v. Duryee, 11 U.S. (7 Cranch) 481, 484 (1813).

383. *Id*. *See* Chicago & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622–23 (1887); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEMPHIS ST. U.L. REV. 1, 55–56 (1981).

384. *Mills*, 11 U.S. (7 Cranch) at 484. *See* M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 324–26 (1839). In *Mills*, Justice Johnson would have limited the "effect," as "faith and credit are terms strictly applicable to evidence." *Id.* at 486 (Johnson, J., dissenting). *See* Cole v. Cunningham, 133 U.S. 107, 112 (1890) ("[The Constitution] did not make the judgments of the States domestic judgments, to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. . . . [T]hey enjoy, not the right of priority or privilege or lien which they have in the [S]tate where they are pronounced, but that only which the *lex fori* gives to them, by its own laws, in their character of foreign judgments.").

385. *Mills*, 11 U.S. (7 Cranch) at 485. *See* Davis v. Davis, 305 U.S. 32, 40 (1938). Although the Court did not say as much, by making the full faith and credit provisions applicable to federal courts, Congress was no doubt exercising its power to prescribe "Regulations" for the federal courts' "appellate Jurisdiction, both as to Law and Fact." U.S. CONST. art. III, § 2, cl. 2.

386. *See* Knights of Pythias v. Meyer, 265 U.S. 30, 33 (1924) ("While the judicial proceedings of the federal courts are not within the terms of the [Full Faith and Credit Clause], such proceedings, nevertheless, must be accorded the same full faith and credit by state courts as would be required in respect of the judicial proceedings of another State."); Embry v. Palmer, 107 U.S. 3, 9 (1883) ("The power to prescribe what effect shall be given to

federal judiciary could choose a different rule for the recognition of foreign judgments from that required by the Full Faith and Credit Clause and the implementing act. As we saw with § 1983 and *Bivens*, is there reason to think the Court would recognize any other rule? No, and especially not after *Pennoyer v. Neff*. Before *Pennoyer*, "the due process clauses of the state constitutions were *not* interpreted to require the states to follow the international rules of jurisdiction."[387] What *Pennoyer* did was link the question of personal jurisdiction with due process; in effect, *Pennoyer* incorporated principles of international comity into the Fourteenth Amendment.[388] In the years since *Pennoyer*, the Court has come to rely more and more on the Due Process Clause for choice-of-law principles, admitting that it "has taken a similar approach in deciding choice-of-law cases under both the Due Process Clause and the Full Faith and Credit Clause."[389] As one author observed,

the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution [and not the Full Faith and Credit Clause].").

387. LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 193 (3d ed. 2004).

388. Pennoyer v. Neff, 95 U.S. 714, 733 (1877) ("Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of [judgments issued in violation of international law] may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."). *Pennoyer*'s statement was arguably dicta because the Fourteenth Amendment was not in effect when Oregon issued the judgment in favor of Pennoyer and against Neff, although it was in effect when the judgment was enforced. *See* Wendy Collins Perdue, *Sin, Scandal and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 499–500 n.142 (1987). *See also* Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1311 (2017).

The Court has not had occasion to determine whether federal long-arm jurisdiction is subject to the same rules under the Due Process Clause of the Fifth Amendment, but the Court has hinted that it likely binds the federal courts in the same way. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102 n.5 (1987). *See* Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1784 (2017); Peay v. BellSouth Med. Assistance Plan, 205 F.3d 1206, 1212 (10th Cir. 2000); Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1220 (1992).

389. Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 n.10 (1981) (plurality op. of Brennan, J.); *see id.* at 321–22 nn. 4–6 (Stevens, J., concurring in the judgment); *see also* Order of United Com. Travelers of America v. Wolfe, 331 U.S. 586, 622 (1947); Home Ins. Co. v. Dick, 281 U.S. 397, 410–11 (1930); Lea Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 IOWA L. REV. 95, 97, 108 (1984) ("[C]ourts could . . . have fit choice of law . . . under due process instead of full faith and credit," but "the due process clause . . . dominates choice of law theory.").

the Court has "subject[ed] to federal supervision the entire field of the legislative jurisdiction of the states."[390]

If Congress altered the implementing act with respect to federal courts, would the Due Process Clause of the Fifth Amendment bind the federal courts to the same "Full Faith and Credit" as is required by the Full Faith and Credit Clause of Article IV? Unlike the Full Faith and Credit Clause, the Due Process Clause "is self-acting. It requires no legislation to carry it into effect."[391] It takes little imagination to envision that what Congress has required of federal courts by statute would be required by the Due Process Clause of the Fifth Amendment, making the federal rule congruent to what is required of the states through the Full Faith and Credit Clause.

4. The Guarantee Clause

The Preamble declares that among the purposes of the Constitution are to "*provide* for the common defence," "*promote* the general [w]elfare," and "*insure* domestic [t]ranquility."[392] The verbs were carefully chosen and reflect an assessment of the respective responsibilities of the new government and the states. The United States was to assume responsibility for the defense of the United States as a whole;[393] the United States would share responsibility with the states to promote the general welfare;[394] and the states would assume primary responsibility for maintaining domestic tranquility, with the assurance that the United States would provide aid as necessary.[395] The word "insure" in the

390. G.W.C. Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?*, 15 MINN. L. REV. 161, 178 (1931).

391. Bd. of R.R. Comm'rs v. Great N. Ry. Co., 281 U.S. 412, 413 (1930) (argument of James Morris for appellants). *But see* Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201 (2009) (suggesting that the Clause contemplated a more active role for Congress).

392. U.S. CONST. pmbl. (emphasis added).

393. *Id.* art. I, § 8, cls. 11–16 (granting Congress the power to declare war, raise armies and maintain a navy and suppress insurrections and repel invasions); art. I, § 10, cl. 3 (forbidding the states to engage in war "unless actually invaded, or in such imminent Danger as will not admit of delay").

394. *Id.* art. I, § 8, cl. 1 (granting Congress to "lay and collect [t]axes" for the "general Welfare of the United States").

395. *Id.* art. IV, § 4 ("The United States . . . shall protect [every State] . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."). *See* Jay S. Bybee, *Insuring Domestic Tranquility:* Lopez, *Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1 (1997).

Preamble suggested that the role of the United States was one of surety, that it was a guarantor, rather than a principal. This understanding was reflected in the Guarantee Clause in Article IV: "The United States shall guarantee to every State in this Union a Republican Form of Government."[396]

Since *Luther v. Borden*,[397] we have commonly assumed that the Guarantee Clause is not justiciable and that questions concerning a state's republican form of government are political questions committed to the political branches.[398] Nevertheless, the Court has left open the possibility that some claims would be justiciable.[399] Various academics have called for the Court to hold the Guarantee Clause justiciable, even as they disagree over what the Court should adjudicate.[400]

If the Court were to find a role for the Guarantee Clause, there is strong reason to think that the Court would apply the Clause to the federal government as well. Reverse incorporation would likely occur in two steps. First, as we have seen, the most common context for reverse incorporation has been the District of Columbia, which the Court has treated as if it were a state.[401] If it is unthinkable that

396. U.S. CONST. art. IV, § 4. For background on the Guarantee Clause, see WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION (1972); Ryan C. Williams, *The "Guarantee" Clause*, 132 HARV. L. REV. 602 (2018); Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962).

397. Luther v. Borden, 48 U.S. (7 How.) 1, 56 (1849).

398. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019); Baker v. Carr, 369 U.S. 186, 217–29 (1962); Colegrove v. Green, 328 U.S. 549, 556 (1946); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 140–51 (1912).

399. New York v. United States, 505 U.S. 144, 185 (1992) ("[P]erhaps not all claims under the Guarantee Clause present nonjusticiable political questions."). *See also id.* at 184–85 (pointing out that, in prior cases, "the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable" (citing, *inter alia*, Att'y Gen. of Mich. *ex rel.* Kies v. Lowrey, 199 U.S. 233, 239 (1905), and Forsyth v. Hammond, 166 U.S. 506, 519 (1897))).

400. *See, e.g.*, Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 851 (1994) ("[T]he Guarantee Clause should be regarded as a protector of basic individual rights."); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 70–78 (1988) (calling on the Court to be "an impartial umpire to reconcile the competing claims of state and national power").

401. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447–48 (1934) ("[T]he Minnesota statute as here applied does not violate the contract clause . . . . What has been said on that point is also applicable to the contention presented under the due process clause [of the Fifth Amendment, applicable to the District of Columbia]."); Block v. Hirsh, 256 U.S. 135 (1921) (upholding a D.C. rent control statute against Takings and Due Process Clause

the Equal Protection Clause would not apply to the District of Columbia's schools, it is no less unthinkable that the Court would not judge home rule in the District on the same basis.[402]

The second step follows easily from the first: Having crossed the Rubicon of reverse incorporation, the Court would declare the guarantee of a republican form of government applicable to acts of Congress and the executive as well. The guarantee of a republican form of government is a duty of the United States; indeed, the Guarantee Clause is the only instance in the Constitution in which "United States" is used as the subject of a sentence. The Clause, in this context, confers power on all three branches of government,[403] and the Court might well see in the Guarantee Clause a duty on the part of the United States to maintain its own republican form of government in order to secure such a promise to the states.

III. THE UNCERTAIN FOUNDATIONS OF REVERSE INCORPORATION

The sheer scope of the provisions the Court has declared congruent, together with provisions a future Court might well find congruent, is staggering. The Court has, clause by clause, broken down distinctions between the federal government and the states. Some justifications for making provisions congruent are stronger than others, but we have to question the Court's effort to improve the Constitution by rewriting it. Section A reviews how the Court has approached reverse incorporation from the perspective of the text. It concludes that reverse incorporation is textually incoherent,

challenges); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921) (upholding a New York City rent control statute against a Contracts Clause challenge); *Block*, 256 U.S. at 159 (McKenna, J., dissenting in both cases) (treating the cases alike because they "practically depend on the same principles"); Bolling v. Sharpe, 347 U.S. 497 (1954) (striking D.C. policy of segregated schools under the Due Process Clause; decided same day as *Brown v. Board of Education* struck state segregated schools on the basis of the Equal Protection Clause); Hurd v. Hodge, 334 U.S. 24 (1948) (striking D.C. judicial enforcement of racially restrictive covenants; decided same day as *Shelley v. Kramer*); Shapiro v. Thompson, 394 U.S. 618 (1969) (striking down state travel restrictions under the Equal Protection Clause and D.C. restrictions under the Due Process Clause); *see also* Butz v. Economou, 438 U.S. 478, 499 n.26 (1978) ("'[I]ncongruity' . . . would arise if officials of the District of Columbia, who are not subject to § 1983, were given absolute immunity while their counterparts in state government received qualified immunity.").

402. *See* Samuel B. Johnson, *The District of Columbia and the Republican Form of Government Guarantee*, 37 HOW. L.J. 333 (1994).

403. *See* Bonfield, *supra* note 396, at 523 ("[T]he judiciary was as fully empowered to enforce the obligation as was Congress.").

and that the Court has made little effort to make the Constitution more comprehensible. In section B, this Article addresses how reverse incorporation has undermined the structure of the Constitution. Taking two current questions—mortgage moratoria during the COVID-19 crisis and the possibility of reparations for slavery—the Article analyzes how the Court might have approached these problems under the Contracts Clause and the Equal Protection Clause in an originalist world. The Article points out how reverse incorporation has skewed the substantive rules the Court has adopted. Finally, in section C, the Article considers why, in the face of strong textual and structural reasons counseling against reverse incorporation, the Court has persisted on the path to congruence. It concludes that congruence is a convenient rule for the Court, but more importantly, it gives the Court new and extraordinary power of review over congressional legislation and executive action. Reverse incorporation has altered our federalism and, even more dramatically, affected our separation of powers.

A. Text: The Problem of Mechanics

The mechanics of reverse incorporation are poor. As we consider the dominance of the Due Process Clause as the explanation for reverse incorporation, we can readily identify a number of anomalies in the theory. Indeed, the more we try to explain *Bolling*, the less sense it makes. If the Due Process Clause of the Fifth Amendment has an "equal protection component"[404] equivalent to the Equal Protection Clause, then the Equal Protection Clause is surplusage in the Fourteenth Amendment, where it follows a Due Process Clause identical to the Due Process Clause of the Fifth Amendment. It is one thing to find that two clauses of the Constitution have some overlap; it is quite another to conclude that a clause is entirely subsumed within the clause that precedes it.

We have a similar problem with the Contracts Clause. The framers set out very specific prohibitions on federal action in Article I, Section 9. The Constitution repeated some of these prohibitions verbatim in Article I, Section 10, which only applies to

404. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973). *See* Amar, *Intratextualism, supra* note 22, at 772 ("[T]he words of [the] Equal Protection Clause were not expressing a *different* idea than the words of the Due Process Clause but were elaborating the *same* idea: the Equal Protection Clause was in part a clarifying gloss on the due process idea.").

the states, and then added a Contracts Clause. Clearly, the framers thought they had added value to the Constitution by prohibiting the states from impairing the obligation of contracts. Shortly thereafter, we added a Bill of Rights with a Due Process Clause, but no Contracts Clause. We might argue that a Contracts Clause was not necessary because the Due Process Clause contained an "impairment of the obligation of contracts" component. The short answer is that the framers of the Fifth Amendment followed the Due Process Clause with a Takings Clause, indicating that it was not apparent to them that the Due Process Clause had a "just compensation for taking private property for public use" component. If the Takings Clause was not subsumed in the Due Process Clause, it is hard to see how the Contracts Clause gets read into the Due Process Clause.

Similar problems arise when we consider extra-textual rights such as the right to travel and constitutional remedies. The Court struggled for more than a hundred years to converge on a theory of the right to interstate travel. When a majority of the Court finally achieved consensus under the Privileges or Immunities Clause in *Saenz*, it created new problems for the theory of reverse incorporation. The Court had already held in *Shapiro v. Thompson* that the Due Process Clause of the Fifth Amendment protected the right of interstate travel against the federal government. After *Saenz*, does *Shapiro* guarantee a "privileges or immunities component" of the Due Process Clause? If so, does that mean that the Privileges or Immunities Clause is incorporated against the federal government? Or does it mean the Privileges or Immunities Clause is superfluous, like the Equal Protection Clause? *Bivens* presents an even stranger twist on reverse incorporation, because it suggests that Section 1983—which came out of the Civil Rights Act of 1871—was unnecessary, that all along the Court could have remedied some of the problems of Reconstruction through a creative reading of its Article III powers. It also suggests that Section 5 was not the primary authority for creating causes of action to enforce the Fourteenth Amendment, but was complementary to, or perhaps even ancillary to, the existing powers of the Court.

What is striking in all this is how little attention the Court has paid to the mechanics of reverse incorporation. Whereas in other

contexts, the Court has worked hard at constitutional mechanics,[405] the Court has shown no inclination to examine the history, textual basis, or theory behind its pronouncements. It has shrugged its shoulders, treating reverse incorporation as *fait accompli*, as though it had no further control over the matter.

Although the Court has done nothing in its own defense, a number of academics have attempted to work through theories of reverse incorporation. They have variously attributed reverse incorporation of the Equal Protection Clause to the Bill of Attainder Clause;[406] some combination of the Bill of Attainder, Ex Post Facto, and Title of Nobility Clauses;[407] the Citizenship Clause of the Fourteenth Amendment;[408] the Privileges or Immunities Clause of the Fourteenth Amendment;[409] the Ninth Amendment;[410] and the Due Process Clause of the Fifth Amendment.[411] Many of these theories derive from natural rights theory and require working with the Constitution at a very high level of abstraction. For example, Akhil Amar has argued that the Equal Protection Clause itself can be derived from the Ex Post Facto, Bill of Attainder, and Nobility Clauses.[412] Justice Chase, writing in *Calder v. Bull*, argued that the Contracts Clause, which had no history in the common law or in early American constitutionalism, was as much a part of natural law as the Ex Post Facto or Takings Clauses, and their inclusion (or not) in the Constitution did not determine whether they would be enforced.[413] A rule of interpretation that can find an equal protection principle (Akhil Amar) and an impairment of contracts principle (Justice Chase) in the same

405. *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197–2207 (2020); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492–508 (2010); Edmund v. United States, 520 U.S. 651, 658–66 (1997); United States v. Lopez, 514 U.S. 549, 552–59 (1995).

406. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297–98 n.247 (1995).

407. Amar, *Intratextualism*, *supra* note 22, at 769–71.

408. Amar, *Rethinking Incorporation and Reverse Incorporation*, *supra* note 22, 81–82; Amar, *Intratextualism*, *supra* note 22, at 768; Dolin, *supra* note 22, at 786.

409. Amar, *Rethinking Incorporation and Reverse Incorporation*, *supra* note 22, 82–83.

410. AMAR, *supra* note 170, at 281; ELY, *supra* note 12, at 33; Perry, *supra* note 22, at 70–72.

411. Amar, *Rethinking Incorporation and Reverse Incorporation*, *supra* note 22, 82–84; Amar, *Intratextualism*, *supra* note 22, at 771–73; Rubin, *supra* note 22, at 1181–82 n.6.

412. Amar, *Rethinking Incorporation and Reverse Incorporation*, *supra* note 22, at 85; Amar, *Intratextualism*, *supra* note 23, at 769–70.

413. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (op. of Chase, J.).

clauses is a capacious rule indeed[414]—so capacious that we should wonder if it is a rule at all, or if the rule is so broad that it eclipses the need for a constitution entirely.[415]

Amar, who has called reverse incorporation "right" and "easy,"[416] refers to his most rigorous proof as an "intratextual" reading of the Due Process Clause. It comes in two steps. First, he asserts that the framers of the Fourteenth Amendment believed that the guarantee of equal protection of the laws was subsumed in the promise of due process. That is, the Due Process Clause of the Fourteenth Amendment included the right of equal protection memorialized in the Equal Protection Clause.[417] Thus, the Due Process Clause of the Fourteenth Amendment implies the Equal Protection Clause. His second step is easy: the Due Process Clauses of the Fifth and Fourteenth Amendments are identical, so the Due Process Clause of the Fifth Amendment must also contain a similar promise of equal protection of the laws.[418]

With great respect for Professor Amar's body of work, he has begged the question. Amar's theory depends on a particular order in his premises. Let's reverse his premises to see why. If we begin

414. Ironically, Amar acknowledges that "[u]nder the Founders' Constitution, the rules were emphatically different for the two governments. For example, states could not impair the obligation of contract, but the federal government could." Amar, *Intratextualism*, *supra*, note 22, at 769.

415. Peter Westen, addressing the paradox of "reading 'equal protection' into a provision of the fifth amendment that speaks not of treating people equally but of giving people their 'due[,]'" has offered a sobering assessment of the two clauses. According to Westen, the two clauses may be said to be equivalent, because neither clause means anything in particular.

> The answer is that the paradox itself may be specious: there is no necessary tension between the constitutional language of substantive "due process" and the constitutional language of "equal protection," because "giving every person his due" means "treating like persons alike." There is no necessary difference between a national constitution that contains a substantive due process clause (and omits an equal protection clause) and a national constitution that contains an equal protection clause (and omits a due process clause). That is why the Supreme Court's substantive due process jurisprudence can mirror its equal protection jurisprudence without doing violence to the language of the text. . . . "Justice" and "equality" are merely alternative formulations of whatever one's substantive notions of right or wrong happen to be.

Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 558–59 n.69 (1982).

416. Amar, *Intratextualism*, *supra* note 22, at 767.

417. Amar, *Rethinking Incorporation and Reverse Incorporation*, *supra* note 22, at 84; Amar, *Intratextualism*, *supra* note 22, at 772–73.

418. *Id.*

from the premise that the two Due Process Clauses are identical, then we have to explain why, if there is an equal protection component in the Due Process Clause, the framers of the Fourteenth Amendment added an Equal Protection Clause. Amar's theory reverses the logical order in which we would consider the meaning of identical clauses adopted in different time periods. Amar works backward from the Fourteenth Amendment to the Fifth Amendment. That logic does not comport with any ordinary principle of construction.

Moreover, Amar's intratexualism theory denies the most obvious problem: If the framers of the Fourteenth Amendment believed that due process encompassed a promise of equal protection, why did they author separate clauses, a practice that was only apt to confuse us? One answer might be that including an Equal Protection Clause was the belt to the Due Process Clause's suspenders—both designed for the same general purpose. Fair enough, but if the framers of the Fourteenth Amendment were working on a belt-and-suspenders theory, why not make the Equal Protection Clause applicable to the federal government as well? Professor Amar's theory does not square with the broader historical record. Although it is true that some members of the Thirty-Ninth Congress thought that equal protection was implicit in due process, others were not so persuaded, and they worked to explain what the Equal Protection Clause added to the Constitution.[419] The framers of the Fourteenth Amendment considered and rejected an early proposal to make the amendment applicable to the federal government.[420] Amar notes that no single provision in the original

419. *See supra* Section II.B.1. The closest the Court has come to adopting this premise is a footnote in *Vance v. Bradley*, where the Supreme Court observed that "[c]oncern with assuring equal protection was part of the fabric of our Constitution even before the Fourteenth Amendment expressed it most directly in applying it to the States." 440 U.S. 93, 94–95 n.1 (1979) (citing sources); *see also* Mark A. Graber, *A Constitutional Conspiracy Unmasked: Why "No State" Does Not Mean "No State,"* 10 CONST. COMM. 87, 89 (1993) (arguing that the framers of the Fourteenth Amendment "assumed that Congress was already constitutionally prohibited from depriving any citizens of the equal protection of the law"); Karst, *supra* note 22, at 553–54. Only three years earlier, however, the Court had observed that "[s]ince the Due Process Clause appears in both the Fifth and Fourteenth Amendments, whereas the Equal Protection Clause does not, it is quite clear that the primary office of the latter differs from, and is additive to, the protection guaranteed by the former." Hampton v. Mow Sun Wong, 426 U.S. 88, 100 n.17 (1976).

420. *See supra* note 144.

Constitution applied to the federal government and the states.[421] However, all three of the Reconstruction Amendments have provisions that bind both the states and the federal government. The Thirteenth Amendment is clear but not didactic;[422] the Fourteenth and Fifteenth Amendments are as clear as words can be.[423]

Our discussion thus far has focused, necessarily, on substantive congruence and textual incoherence. That is because the Court has shown great interest in substantive congruence and almost no interest in textual congruence. There have been some missed opportunities for textual congruence. The right to travel is the obvious one. When the Court decided *Shapiro v. Thompson* in 1968, it struggled to explain how the right to interstate travel applied against the states, but once it concluded there was such a right, the Court, in a *Bolling*-like move, simply announced that the Due Process Clause of the Fifth Amendment protected the same right against federal abridgment.[424] When the Court re-examined the right to travel thirty years later in *Saenz*, it worked hard to make the Privileges or Immunities Clause fit its theory with respect to the states, but it took no account of its previous holding with respect to the federal government.[425] It would have been a simple matter to declare that the right to travel was protected by the Due Process Clause of the Fourteenth Amendment. The Court would have preserved substantive congruence and achieved textual congruence. Instead, it only deepened the divide between substantive and textual congruence in reverse incorporation.

This brings us to one last point. There is a unifying theory for where the Court has arrived, but it comes with its own challenges. The theory is that it is "turtles all the way down":[426] everything is

421. Amar, *Intratextualism*, *supra* note 22, at 769.

422. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States[.]").

423. *Id.* amend. XIV, § 4 ("*[N]either the United States nor any State* shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States[.]") (emphasis added); amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged *by the United States or by any State* on account of race, color, or previous condition of servitude.") (emphasis added).

424. Shapiro v. Thompson, 394 U.S. 618, 642 (1969). *See supra* Section II.C.

425. Saenz v. Roe, 526 U.S. 489, 502–04 (1999).

426. As Stephen Hawking tells the story:

substantive due process. The Court can square everything up by making the entire enterprise an exercise in substantive due process, informed by, but not limited to, whatever specific limitations the framers chose to impose on one government or another in the Constitution. Under this view, the Bill of Rights, the Contracts Clause, and the Equal Protection Clause just present a list of things that might be comprehended within the meaning of "due process." The theory presents several problems. First, that is not the way the Court has treated more specific rights in the Constitution, so the Court has at least thought that it was doing something else. Second, it should make us wonder why the federal Due Process Clause was buried deep in the Fifth Amendment, instead of being listed first, and why the states' Due Process Clause followed the Privileges or Immunities Clause. If everything is substantive due process, we might have just led off with those clauses and saved everyone a lot of trouble. Whatever other criticism we might level at substantive due process, it would, however, at least bring us both substantive and textual congruence.

B. Structure: Thinking About the "Unthinkable"[427]

For the framers of the Constitution, the Bill of Rights, and the Fourteenth Amendment, congruence was sometimes, but not always, required. The Constitution implicitly recognizes concurrent powers inherent in all governments, such as the power to tax, and concurrent powers, subject to defeasement of the states' powers, such as regulating commerce or bankruptcies. It also expressly recognizes congruent disabilities, such as the prohibitions on passing ex post facto laws, granting titles of nobility, or abridging the right to vote on account of race, color, or sex. This Article has cataloged instances where governmental powers, disabilities, or immunities were asymmetrical in the design of the Constitution

> A well-known scientist . . . once gave a public lecture on astronomy. . . . At the end of the lecture, a little old lady at the back of the room got up and said: "What you have told us is rubbish. The world is really a flat plate supported on the back of a giant tortoise." The scientist gave a superior smile before replying, "What is the tortoise standing on?" "You're very clever, young man, very clever," said the old lady. "But it's turtles all the way down!"

STEPHEN HAWKING, A BRIEF HISTORY OF TIME 1 (1988).

427. With apologies to Herman Kahn, who had more existential matters on his mind. HERMAN KAHN, THINKING ABOUT THE UNTHINKABLE (1962) (considering the survivability of thermonuclear war).

but which the Court has declared congruent. Such congruence is contrary to the original design, but, for the most part, we have enthusiastically embraced it, acquiesced in it, or not noticed it. So, we are entitled to ask at this point, aside from textual coherence, what has congruence cost us? What might we have relinquished as we embraced congruence and blurred the lines between the powers of the federal government and the powers of the states?

For many of the provisions of the Constitution, congruence may or may not be textually coherent, but substantive congruence through reverse incorporation is harmless enough. For example, *Chisolm v. Georgia* may have been a mistake, but one we corrected quickly through the Eleventh Amendment. Once we had amended the Constitution, it was impossible for the Court to reverse course on *Chisolm*. So, which should the Court have done with respect to *federal* sovereign immunity—followed *Chisolm* and forced the amendment of the Constitution again? Or simply held that the federal government enjoyed sovereign immunity? The Court chose the second course of conduct, and no one seemed to object.[428] The Court, however, surely owed us an explanation, which it has never given, but on the whole, the effective reverse incorporation of the Eleventh Amendment has been unobjectionable, perhaps because we suspect *Chisolm* was wrong all along.

There are other reverse incorporated provisions of the Constitution, however, containing embedded values where congruence may have undermined federalism in one way or another. Consider two examples of current controversial issues—mortgage relief during times of emergency and reparations for slavery—to ask whether noncongruence really is, as the Court adverted in *Bolling*, "unthinkable."[429] These public controversies invoke issues raised by the two most important clauses that have been reverse incorporated: the Contracts Clause and the Equal Protection Clause.

Start with the Contracts Clause. In early 2020, the United States, like the rest of the world, was paralyzed by the threat of the COVID-19 pandemic. The economy slowed dramatically, and many economic sectors—particularly in the service industries—shut down entirely. Congress and the states responded with

428. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 410 (1821); *see also supra*, Section II.D.

429. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

emergency legislation. Many states and municipalities enacted rent and mortgage relief. Typically, the emergency legislation did not forgive rent or mortgage payments but extended the time to pay until after the emergency ceased, thereby placing a moratorium on evictions and foreclosures.[430] Consistent with *Blaisdell*, the COVID-19 courts uniformly ruled against mortgagees and landlords who brought claims under the Contracts Clause.[431] In March 2020, at the same time that the states were enacting moratoria, Congress adopted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act),[432] which afforded rental and mortgage relief for persons participating in certain federal housing programs.[433] There were no direct challenges to the CARES Act brought under the Contracts Clause, but any challenge would surely have failed for the same reasons the challenges to state moratoria failed.

Recall that one purpose of the Contracts Clause was to prevent states from altering the law under which a contract was made, thereby relieving one party from its obligations to a second party. Debtors' relief laws were "the classic cases concerning legislation of the kind which the [f]ramers wished to prevent."[434] During the

430. *See, e.g.*, Elmsford Apartment Assoc., LLC v. Cuomo, 469 F. Supp. 3d 148, 157–60 (S.D.N.Y. 2020) (discussing emergency measures in New York); Auracle Homes, LLC v. Lamont, 478 F. Supp. 3d 199, 207–11 (D. Conn. 2020) (same; Connecticut); Hapco v. City of Philadelphia, 482 F. Supp. 3d 337, 344–48 (E.D. Pa. 2020) (same; City of Philadelphia).

431. *Elmsford Apartment Assoc.*, 469 F. Supp. 3d at 168–72; *Auracle Homes,* 478 F. Supp. 3d at 223–26; *Hapco*, 482 F. Supp. 3d at 349–56; Baptiste v. Kennealy, 490 F. Supp. 3d 353, 382–87 (D. Mass. 2020); Apartment Ass'n of Los Angeles Cnty., Inc. v. City of Los Angeles, 500 F. Supp. 3d 1088, 1094–1100 (C.D. Cal. 2020); Melendez v. New York, 503 F. Supp. 3d 13, 31–36 (S.D.N.Y. 2020); El Papel, LLC v. Inslee, No. 2:20-cv-1323, 2020 WL 8024348, at *6-12 (W.D. Wash. Dec. 12, 2020); Heights Apartments, LLC v. Walz, 510 F. Supp. 3d 789, 808–10 (D. Minn. 2020); Johnson v. Murphy, 527 F. Supp. 3d 703, 715–18 (D.N.J. 2021); *see also* District of Columbia v. Towers, 250 A.3d 1048, 1052 (D.C. Ct. App. 2021) (upholding a D.C. moratorium eviction and noting that the District of Columbia is prohibited from enacting any law that, if it were a state, would violate the Contracts Clause; D.C. Code § 1-203.02).

432. *See, e.g.*, CARES Act, Pub. L. No. 116–136 (2020), *codified at* 15 U.S.C. §§ 9041–63.

433. *See, e.g.*, 15 U.S.C. §§ 9056–58 (providing for mortgage forbearance and a moratorium on evictions in certain cases); *see also Auracle*, 478 F. Supp. 3d at 208–09. The Centers for Disease Control, a component of HHS, issued its own eviction moratorium order.

434. WRIGHT, *supra* note 39, at 104. The leading case is Bronson v. Kinzie, 42 U.S. (1 How.) 311, 315–21 (1843), but the principle was set out in *Green v. Biddle*: a law that "postpon[es], or accelerat[es], the period of performance which it prescribes, impos[es] conditions not expressed in the contract, or dispens[es] with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation." 21 U.S. (8 Wheat.) 1, 84 (1823). *See* Barnitz v. Beverly, 163 U.S.

Marshall Court, such laws were "unconstitutional when given a retrospective application" but were "valid when applied to contracts made after the law was passed."[435] Under the original view of the Contracts Clause, the states would have been forbidden from enacting even temporary mortgage relief during the pandemic. By the same measure, however, Congress would not have been subject to the Contracts Clause and, with its express powers to regulate interstate commerce and provide uniform bankruptcy rules, might have granted nationwide mortgage relief.[436] And the logic is impeccable: the danger for the framers of the Contracts Clause was that the state legislatures might enact mortgage relief for their own citizens at the expense of largely out-of-state banks, which were not their concern. For the framers, mortgage relief was the economic equivalent of imposing a tax or a tariff on out-of-state firms doing business in the state. Congress, by contrast, has as its constituents both the stressed mortgagors and the mortgagee banks. Its calculus for relief takes into account both sides of the contract and is more likely to reach a balanced solution. Thus, although the states are forbidden to impair the obligation of such contracts, Congress, in its wisdom, would be free to do so, and surely would have the power to do so under the Commerce Clause.

What is unthinkable about looking to Congress alone for mortgage or rental relief? If the states are forbidden to impair the obligation of contracts, but Congress is empowered to regulate commerce among the states, why is it unthinkable that Congress would have exclusive power to impair the obligation of contracts when necessary? Why is that any more unthinkable than that Congress has exclusive power to grant letters of Marque or

118 (1896); Walker v. Whitehead, 83 U.S. (16 Wall.) 314 (1872); Howard v. Bugbee, 65 U.S. (24 How.) 461 (1860). *See also* Charles Warren, *Earliest Cases of Judicial Review of State Legislation by Federal Courts*, 32 YALE L.J. 15, 26–27 (1922) (discussing *Champion v. Gray*, an unreported case in which the U.S. circuit court held a legislative resolution extending by three years Casey's obligation to repay his debts violated the Contracts Clause; first known case of a federal court holding a state statute in violation of the U.S. Constitution).

435. WRIGHT, *supra* note 39, at 104.

436. *Cf.* Ala. Ass'n of Realtors v. U.S. Dep't of Health and Hum. Servs., No. 21-5093, 2021 WL 2221646, at *3 (D.C. Cir. June 2, 2021) ("Congress has well-established authority to regulate rental housing transactions [related to the COVID emergency] because they substantially affect interstate commerce.") (cleaned up).

Reprisal,[437] or that only the United States can enter into a treaty?[438] We might think it more convenient to let the states, subject to congressional preemption, address mortgage crises in their own way; in some circles, it would be a rational and federalism-forward thing to do. But it is not what we did. The Supreme Court has effectively read the Contracts Clause out of the Constitution. We might applaud the result, but if we are going to bind ourselves to a written Constitution, we cannot abide the method.

Moreover, the unitary rule the Court ultimately adopted reflects neither Article I, Section 10's Contracts Clause, nor Article I, Section 9's empty space where a Contracts Clause might have gone. As the Court narrowed the distance between the states and the federal government, the Court's impairment-of-contracts rule met someplace in the middle—where the states were mostly free to impair contracts, and Congress is somewhat restricted in its ability to impair contracts. It is a congruent rule, but one that does not accord with the Constitution for either the states or the federal government. The Court's compromise is not only contrary to the text, but it is also contrary to the history and logic of the Constitution as well. There is nothing "unthinkable" about following the Constitution as written.

The Equal Protection Clause presents a more complicated variation on this problem. As discussed in section III.B., for the most part, as a policy matter, the equal protection component of the Due Process Clause of the Fifth Amendment is unobjectionable with respect to those subjects that were not within its original purposes—sex, sexual orientation, family, wealth, age, etc. The one class that the Equal Protection Clause was designed to protect—race (and previous condition of servitude)—is more complex. As a matter of policy, surely no one would object to requiring the federal government to satisfy strict scrutiny with respect to invidious racial discrimination. But what about affirmative action programs? Obviously, whether such programs constitute a form of invidious discrimination or good policy is controversial and will not be addressed here. Our question is limited to: "Are they

437. U.S. CONST. art. I, § 8, cl. 11 ("Congress shall have Power . . . To . . . grant Letters of Marque and Reprisal."); *id.* Art. I, § 10, cl. 1 ("No State shall . . . grant Letters of Marque and Reprisal.").

438. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power . . . to make Treaties."); *id.* art. I, § 10, cl. 1 ("No State shall enter into any Treaty.").

constitutional?" The Thirty-Ninth Congress that proposed the Fourteenth Amendment also proposed various programs to benefit new African American citizens. Is it unthinkable that the Equal Protection Clause would bar the states, with their poor record of treatment of Blacks, from treating people differently on account of race, but that Congress might have the authority to adopt race-specific measures?[439] Yet, after *Adarand*, all governmental programs, federal or state, that touch race are subject to strict scrutiny. Is it unthinkable, for example, that Congress might offer reparations to the descendants of formerly enslaved people?[440] Must such legislation run the gauntlet of strict scrutiny?[441] Is it "unthinkable" that such a federal program might be subject to lesser scrutiny because it originates in Congress rather than in the states?[442] What makes us think that congruence is the only answer? Not the text or structure of the Constitution.

439. *See* Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 54 (1995) ("[T]he Fourteenth Amendment is plausibly seen primarily as a grant of power to Congress to impose a standard of behavior upon the states, only secondarily as a grant of power to the courts to do the same in the absence of legislation, and only distantly and remotely as a constitutional constraint on Congress itself.").

440. *See, e.g.*, Commission to Study and Develop Reparation Proposals for African-Americans Act, H.R. 40, 117th Cong. (2021); Calif. Gov't Code § 8301.1(b) (2021) (creating Task Force to Study and Develop Reparation Proposals for African Americans, with a Special Consideration for African Americans Who are Descendants of Persons Enslaved in the United States); New York State Community Commission on Reparations Remedies, B. 3080-A, 2019-2020 Gen. Assemb. (N.Y. 2019); Mark Guarino, *Evanston, Ill., Leads the Country with First Reparations Program for Black Residents*, WASH. POST (Mar. 2, 2021), https://www.washingtonpost.com/national/evanston-illinois-reparations/2021/03/22/6b5a308c-8b2d-11eb-9423-04079921c915_story.html.

441. *See, e.g.*, Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 525–35 (2003) (discussing how the Equal Protection Clause might apply to congressional reparations for slavery; considering various proposals); Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. THIRD WORLD L.J. 157, 157–58 (2004) ("[I]t is unlikely that reparations for slavery will overcome the strict scrutiny of racial classifications."); Carlton Waterhouse, *Follow the Yellow Brick Road: Perusing the Path to Constitutionally Permissible Reparations for Slavery and Jim Crow Era Governmental Discrimination*, 62 RUTGERS L. REV. 163, 169 (2009) (arguing that "affirmative action jurisprudence" represents "the proper framework for assessing reparations programs" and "a passable road may exist to reach constitutional reparations"); *see also* Ryan Fortson, *Correcting the Harms of Slavery: Collective Liability, the Limited Prospects of Success for a Class Action Suit for Slavery Reparations, and the Reconceptualization of White Racial Identity*, 6 BERKELEY AFR.-AM. L. & POL'Y REP. 71, 97–100 (2004) (discussing difficulties in bringing a lawsuit for reparations).

442. Nor is it likely that Congress, even if the Court were willing to give it some leeway, could authorize the states to adopt affirmative action programs. In general, Congress cannot

These examples should trouble us because they are not purely theoretical problems. The potency of the Equal Protection Clause, in particular, may lead courts to balance away other powers that we expect the federal government to exercise.[443] This Article takes no position on the policy or constitutionality of any particular rule about mortgage moratoria or reparations. The point is that constructive discussions that we might have had about these subjects may be foreclosed by the congruence principle because, from the outset, we understand that the Supreme Court has declared a single rule and will apply it to proposals from the states and the federal government. The congruence principle cannot tell us what the rule will be; it only tells us that whatever rule the Court chooses, it will be a single rule for all levels of government. And that fact skews the debate over the substantive rule. Once we decide, for example, that the federal government will be subject to the same Contracts Clause restrictions as the states, the courts will be tempted to under-enforce the Contracts Clause, lest it unduly restrict Congress as well.

On the other hand, the Court is going to be tempted to over-enforce the Equal Protection Clause with respect to Congress, lest it under-enforce it with respect to the states. We should not be surprised to see the same principle at work with respect to the right to travel. We may see a different hydraulic at work in the constitutional tort area, where the Court has shown a reluctance to extend its *Bivens* jurisprudence even though it previously declared *Bivens* and Section 1983 suits to be congruent. In that arena, the Court seems more concerned that it not over-enforce *Bivens* or underenforce Section 1983.[444] In general, however, the congruence principle has shoe-horned us into a single, national

authorize the states to violate the Constitution, including "legislation that purports to validate any such violation." Saenz v. Roe, 526 U.S. 489, 508 (1999). And the states have tried to piggyback on Congress's affirmative action programs before, without success. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding unconstitutional Richmond's requirement that contracts hire minority owned business; Richmond had adopted verbatim a federal definition of "Minority Business Enterprises").

443. *See* Brackeen v. Haaland, 994 F.3d 249, 456 (5th Cir. 2021) (Costa, J., concurring in part and dissenting in part) (criticizing the plurality's application of *Bolling* to strike down portions of the Indian Child Welfare Act; the plurality "overrides the plenary federal power over Indian affairs . . . based on a principle that finds support in neither text nor history: the notion that the Constitution prohibits the federal government from granting preferences to tribe members").

444. *See supra* Section II.E.

debate over the proper scope of all governments—a debate moderated by the Supreme Court that will result in a unitary and fixed rule.

C. Policy: The Value of Congruence

So why have we done this to ourselves? What moves the Court to right–margin justify the lines of federalism? There are two broad reasons: convenience and power.

1. The Allure of Convenience

In some respects, congruence is an appealing principle, even if it is not a principle of interpretation. It is hard to argue with equality. As a universal ideal, it is fine, but once we get to the details, things get tough quickly. Does equality mean everyone gets exactly the same? Or does it mean everyone similarly situated gets treated the same? And what counts for "similarly situated?" For anyone who has tried to explain to an eleven-year-old boy why his sixteen-year-old sister gets more allowance and a later curfew on a Friday night, the concept of equality becomes fluid indeed.[445]

Our first observation involves no lofty principle: Congruence is convenient for the Court.[446] And the Court figured this out through its experience with incorporating the Bill of Rights. In that context, the Court initially employed a two-track approach in which the Court was more generous towards the states with respect to rights incorporated against them through the Due Process Clause of the Fourteenth Amendment and more strict with the federal government, which was bound by the specific terms of the Bill of Rights.[447] The two-track approach left some play in the constitutional joints.[448] So long as the Court thought the states were only obligated to ensure some kind of rudimentary freedom of religion or speech or minimal respect for the security of our

445. *See* Westen, *supra* note 415, at 573 n.125.

446. *See* Bybee, *supra* note 20, at 131.

447. The Court referred to this process as "absorption," Palko v. Connecticut, 302 U.S. 319, 326 (1937), and explained that it "does not incorporate, as such, the specific guarantees found in the [Bill of Rights]," but only that which is a "denial of fundamental fairness, shocking to the universal sense of justice[.]" Betts v. Brady, 316 U.S. 455, 461-62 (1942). *See* Twining v. New Jersey, 211 U.S. 78, 99 (1908); Bybee, *supra* note 20, at 81–82.

448. *See* Wolf v. Colorado, 338 U.S. 25, 28 (1949); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

persons, homes, papers, and effects, the Court was drawing two sets of lines: one for the states under the Due Process Clause and another for the federal government under the more specific charge of the Bill of Rights. Over time it was simply easier for the Court to draw one line; the Court settled for what Justice Harlan called "jot-for-jot" incorporation[449]: It not only "satisf[ied] a longing for certainty,"[450] but the Court decided "[i]t would be incongruous to have different standards determine the validity of a claim."[451] *Bolling* came of age after the Court had largely determined to go with a single rule for the rights found in the Bill of Rights. When, in *Bivens*, the Court decided to recognize a federal tort for constitutional violations, it self-consciously decided that it would be identical to Section 1983 and frankly admitted that any other rule "would be incongruous and confusing."[452] The convenience of congruence was not lost on the Court or the commentators.[453]

Substantive congruence also brought the Court the convenience of text and legislative history. It was much easier to speak in terms of the Equal Protection Clause than it was to the pedantic, but technically correct, "equal protection component of the Due Process Clause of the Fifth Amendment."[454] Over time we have come to regard the Equal Protection Clause as applying of its own force to the federal government; our collective misremembrance has created a kind of paratext that adds credibility to the Court's pronouncements. Congruence had other salutary consequences. By embracing the text of the Constitution, and not just a concept of "due process," the Court acquired the text's history – *The Federalist*, statements from the framers of the Constitution, and whatever drafting history there was for the clause or amendment.[455] Congruence has brought additional legitimacy to

449. Duncan v. Louisiana, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting).

450. *Wolf*, 338 U.S. at 27.

451. Malloy v. Hogan, 378 U.S. 1, 11 (1964).

452. Butz v. Economou, 438 U.S. 478, 499 (1978) (quotation marks and citation omitted).

453. *See, e.g.*, Louis Henkin, "*Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74, 77 (1963) (congruence "simplif[ied] constitutional jurisprudence, the administration of justice, and cooperation between state and federal agencies").

454. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973).

455. The best examples come from cases addressing the incorporation of the Bill of Rights. A classic statement comes from *New York Times Co. v. Sullivan*:

the Court's decisions as it anchored the Court in the familiar tools of interpretation.

The Court's own convenience, however, is a high price to pay for the discordant textual analysis reverse incorporation has brought. Perhaps the Court has the convenience of the people in mind as well. Like quantum mechanics, federalism is complicated,[456] and it is hard to explain to a public that is not steeped in constitutional theory why one rule for equal protection applies to the states but another applies to the federal government. For the Court, congruence may look like self-help, but it is also the path of least resistance.

2. The Will to Power

More importantly, the move to congruence is also rooted in the will to power. As the Court, clause by clause, declared the Constitution congruent, it also expanded its own power, without the need of constitutional amendment or facilitating legislation.[457] Reverse incorporation does not just give the Court control over additional subject matter; it gives the Court powerful checks over the legislative and executive branches. When the Court declared segregated schools in the District of Columbia unconstitutional, the Court assumed for itself Congress's "exclusive" power over the District[458] and pre-empted whatever authority the President might have exercised in the District. When the Court made the Contracts Clause applicable to the federal government, it acquired a new tool for reviewing federal legislation and executive actions. When the Court declared the federal government immune from suit,

> There is no force in respondent's argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. . . . [T]his distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment's restrictions.

376 U.S. 254, 276–77 (1964). *See also, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 603–05 (2008) (Second Amendment); Crawford v. Washington, 541 U.S. 36, 42–50 (2004) (Sixth Amendment); Atwater v. City of Lago Vista, 532 U.S. 318, 336–40 (2001) (Fourth Amendment); Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal Inc., 492 U.S. 257, 264–68 (1989) (Eighth Amendment); Marsh v. Chambers, 463 U.S. 783, 786–92 (1983) (Establishment Clause); Faretta v. California, 422 U.S. 806, 819–21, 827–32 (1975) (Sixth Amendment).

456. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (in federalism, "[t]he [f]ramers split the atom of sovereignty").

457. I have made similar points with respect to the Court's incorporation cases. Bybee, *supra* note 20, at 132.

458. U.S. CONST. art. I, § 8, cl. 17 ("Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District . . . .").

it anticipated how Congress and the states might have responded to another decision like *Chisolm*. And when the Court created a *Bivens* remedy, it took from Congress the right to decide what checks, like the Administrative Procedure Act[459] and the Federal Tort Claims Act,[460] the courts would exercise against executive agencies and officers.

Moreover, by the exercise of sheer will, the Court is expanding its own jurisdiction under Article III. As it expands the scope of the Due Process Clause to include the Contracts Clause, the Equal Protection Clause, the right to travel, and other provisions, the Court is creating new causes of action—it is manufacturing its own "Cases [and] Controversies to which the United States shall be a Party."[461] Through the process of reverse incorporation, the Court may have conferred sovereign immunity on the United States, but in the end analysis, it has made the United States more amenable to suit.

And that brings us to a final point, an important distinction between incorporation and reverse incorporation. Incorporation principally sounds in federalism; reverse incorporation affects federalism, but it ultimately sounds in separation of powers. Many of the Court's reverse incorporation decisions began, innocuously enough, in the District of Columbia, where the Court felt it had to apply the same rule it was applying in the states.[462] The legal status of the District has always been a bit complicated. The Court had previously held that the District of Columbia, as a federal enclave, was subject to the Fifth Amendment but not to the Fourteenth Amendment.[463] On the other hand, the Court had treated the District of Columbia as a state for Article III purposes.[464] Only the year before *Bolling*, the Court had, ambiguously, suggested that the District of Columbia was "subject of course to constitutional limitations to which all lawmaking is subservient."[465] The Court's

459. 5 U.S.C. §§ 701–06.

460. 28 U.S.C. §§ 1346(b), 2671–80.

461. U.S. CONST. art. III, § 2.

462. *See supra* note 399 and accompanying text.

463. Wight v. Davidson, 181 U.S. 371, 384 (1901).

464. *See, e.g.*, Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 587 (1949) (holding that D.C. is a "state for diversity purposes"), *effectively overruling* Hepburn v. Ellzey, 6 U.S. (2 Cranch) 445 (1805) (Marshall, C.J.).

465. District of Columbia v. John R. Thompson Co., 346 U.S. 100, 109 (1953).

reverse incorporation decisions may have begun in the District of Columbia because it was "unthinkable" that a different rule would apply to the District than applied to the states. But the Court's reverse incorporation decisions were never limited to the District of Columbia but applied to the federal government generally. The District of Columbia frequently provided the excuse for reverse incorporation, but reverse incorporation never ended there. Whatever rule the Court applied in the District of Columbia, the Court ended up applying throughout the federal government. Had the Court limited reverse incorporation to the District of Columbia, congruence would have been a much more modest rule.

Reverse incorporation represents an enormous accretion of power to the Court. Reverse incorporation has given the Court a much broader check on Congress and executive agencies than it could have claimed under the original design.

CONCLUSION

The history of reverse incorporation is both extensive and consistent. It covers every era of the Court, although its greatest developments took place during the latter half of the twentieth century. From a constitutional policy perspective, many of the Court's decisions to reverse incorporate constitutional constraints are innocuous enough; others are more consequential. From an interpretive perspective—a question of constitutional methodology—the decisions are deeply troubling. Yet the Court has never squarely faced the interpretive problems except from the highest of perches.

Reverse incorporation should leave us with some unsettling questions. Justice Johnson once warned us that "[o]ne half the doubts in life arise from the defects of language."[466] Such ambiguities feel like an inevitable part of life, but the best of the lawyers' craft is to minimize such misunderstandings. Trying to capture the relationship between governments and their people by distilling powers, rights, privileges, and immunities in a written text feels like it might take us a long way to avoid such "doubts in life." Perhaps that is why Chief Justice John Marshall wrote, "in America . . . written constitutions have been viewed with so much reverence[.]" They were our "greatest improvement on political

466. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 232 (1824) (Johnson, J., concurring).

institutions[.]"[467] Was our Constitution not clear enough for us to tell whether a clause applies to the states, the federal government, or both? For the framers of this, or any other constitution, what do we have to say to get the Court to take the Constitution's text and structure seriously? If our Constitution is not sufficiently clear, is there any other language that is? If not, the next time we draft a constitution, should we just ratify a due process clause and be done with it?

467. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).